Supreme Court, U.S.
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In The
Supreme Court of the United States

THOMAS R. WINSTON, M.D.,

Petitioner,

v.

KANSAS STATE DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES,

Respondent.

On Petition For Writ Of *Certiorari* To The Supreme Court Of Kansas

PETITION FOR WRIT OF *CERTIORARI*

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QUESTION PRESENTED

Whether Due Process of Law is denied in the process of a state government pursuing cases of alleged child abuse or neglect when the suspect is not notified of accusations, investigation, and finding of guilt until after he is "confirmed" as a perpetrator, when his status as a listed perpetrator is then "validated" *ex parte*, and when the evidentiary standard for a finding of "substantiated perpetrator" is "more likely than not."

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PETITION FOR WRIT OF *CERTIORARI*

Dr. Thomas R. Winston respectfully petitions for a writ of *certiorari* to review the judgment of the Supreme Court of Kansas in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Kansas (App. 1) is reported at 49 P.3d 1274 (Kan. 2002). The opinion of the District Court of Johnson County, Kansas (App. 35) is unreported. The Final Order of the State Appeals Committee for the State Department of Social and Rehabilitation Services (App. 45) is unreported. The Initial Order of the Office of Administrative Hearings (App. 57) is unreported.

JURISDICTION

The Supreme Court of Kansas entered its judgment on July 19, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a), which provides that a final judgment of a highest state court "may be reviewed by the Supreme Court by writ of *certiorari* . . . where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution. . . . "

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States guarantees that no state shall "deprive any

person of life, liberty, or property without due process of law. . . . "

The Kansas Annotated Regulations dealing with child abuse have force of law under Kansas Statute Annotated Sections 38-1552, 38-1553, and 65-516 (2001). Under K.A.R. 30-46-15, a person accused of child abuse or neglect is not required to receive notice of any allegations until they are a "confirmed perpetrator." A confirmed perpetrator is one who has been validated by the State Department of Social and Rehabilitation Services. To be "validated" by the department "means a determination by the department of social and rehabilitation services that a substantiated perpetrator poses a danger to children. . . ." K.A.R. 30-46-10(f). To be a "substantiated perpetrator" is to have "been determined by a preponderance of the evidence to have committed a substantiated act of abuse or neglect." K.A.R. 30-46-10(e). The alleged perpetrator must have an opportunity to be interviewed before being validated. K.A.R. 30-46-13(a). (However, in this case, Dr. Winston was not interviewed prior to being validated.) A validated perpetrator's name will not be entered into the central registry for child abuse and neglect until they have exhausted or failed to exercise the appeals process. K.A.R. 30-46-16.

STATEMENT OF THE CASE

Petitioner Thomas R. Winston graduated from Tulane University Medical School in 1975. Dr. Winston was board certified in general surgery in 1981 and recertified in 1991. He was certified by the Board of Cardiovascular and Thoracic Surgery in 1986 and recertified in 1996. Dr.

Winston practiced cardiovascular and thoracic surgery at Research Medical Center, one of the most distinguished hospitals in Kansas City.

In March of 1998, Dr. Winston and his wife, Julia, separated. She filed for divorce. In her petition, she made no allegations of abuse. In August, 1998, she sought child support. The trial court held that due to her very substantial separate income, it would not award her this support.

Immediately following that denial, in August of 1998, the Kansas Department of Social and Rehabilitation Services (SRS) received a report that Dr. Winston had abused his son, D.W. SRS then began an investigation into those allegations. In September of 1998, the police, not SRS, attempted to interview Dr. Winston regarding these allegations. The police never indicated to Dr. Winston that they were conducting the interview on behalf of SRS. The police never did actually interview Dr. Winston. Later, in September of 1998, SRS, not the police, notified Dr. Winston that they had "substantiated" him for the abuse of his son, D.W. On October 9, 1998, Dr. Winston requested a hearing from SRS. SRS did not respond to this request. A month after Dr. Winston's request for a hearing, SRS notified Dr. Winston that they had "validated" him for the physical and emotional abuse of his son. The purpose of such a validation is to place Dr. Winston's name on a central registry for perpetrators of child abuse and neglect. At this point, no one had yet heard Dr. Winston's version of the incident in question. In fact, no one did until well over a year later, at an appeals hearing.

In January of 1999, SRS received another confidential report that Dr. Winston had abused his daughter, M.W., this time sexually, during a visit at the courthouse while

accompanied by a police officer, a psychologist, and a court-appointed child advocate. On April 2, 1999, SRS notified Dr. Winston that they had both substantiated and validated him for the abuse of his daughter.

On April 25, 1999, the office of the district attorney determined that there was insufficient evidence to press criminal charges against Dr. Winston for child abuse. On May 18, 1999, SRS withdrew its validation of Dr. Winston for the abuse of his son.

On May 20, 1999, Dr. Winston requested an administrative appeal hearing as to SRS's substantiation and validation of him for the abuse of his daughter. In early August of 1999, SRS sent Dr. Winston notice that it had again substantiated and validated him for the abuse of his son. SRS based that determination on the same incident as the initial incident from which SRS had just three months previously withdrawn its substantiation and validation. Dr. Winston also appealed this finding. The presiding officer consolidated the two appeals. The administrative appeal order affirmed SRS's finding that Dr. Winston emotionally abused M.W. and that he physically and emotionally abused D.W. It reversed the finding that Dr. Winston sexually abused M.W.

As a result of being "validated" as a perpetrator, Dr. Winston's referrals from other surgeons have dried up. He has had to resort to serving as an emergency room doctor, instead of using his extensive skills as a surgeon. He has to take work wherever he can find it, often more than 100 miles away from his home, in Kansas City.

How the Federal Question Was Presented

Dr. Winston appealed the administrative findings to the State Appeals Committee, a part of the Department of SRS. Dr. Winston raised a number of issues on appeal, one of which was that SRS deprived him of Due Process of Law. SRS appealed the exoneration of Dr. Winston as to sexually abusing M.W. The State Appeals Committee affirmed the administrative findings in both appeals.

Dr. Winston appealed this finding to the District Court of Johnson County, Kansas. SRS did not cross-appeal. Dr. Winston claimed, among other things, that SRS had not afforded him Due Process of Law under the Constitution of the United States. The district court affirmed all of the previous decisions and held that due process had been afforded.

Dr. Winston then appealed to the Court of Appeals of the State of Kansas. The Supreme Court of Kansas transferred the case by their own motion. The Supreme Court of Kansas affirmed the judgment of the trial court including the finding as to due process.

REASONS FOR GRANTING THE WRIT

I. The Supreme Court of Kansas's decision that the state's child abuse and neglect reporting statute does not violate Due Process conflicts with the decisions of the Second and Seventh Circuits as to very similar systems having the same grave deficiencies.

The Supreme Court should take this case because the Supreme Court of Kansas, a state court of last resort, has

decided an important federal question in a way that conflicts with the decision of the United States Court of Appeals for the Second Circuit, *Valmonte v. Bane*, 18 F.3d 992 (2d Cir. 1994), and the United States Court of Appeals for the Seventh Circuit, *Doyle v. Camelot Care Centers,* 2002 WL 1992496 (7th Cir. 2002). These cases address an important problem: Procedural Due Process violations arising under state laws regarding the placing of a person's name on a central registry for perpetrators of child abuse and neglect.

In this case, the Supreme Court of Kansas held that Dr. Winston's liberty interest in his ability to freely maintain or work in a child care facility and to avoid the stigma which would accompany his name erroneously being placed on a statewide registry is outweighed by the state's need to address the issue of child abuse quickly and efficiently and that the risk of error would be minimal because the Department of Social and Rehabilitation Services is required to use a "more likely than not" standard of review.

Two circuit courts have evaluated similar child registry laws and come to conclusions that conflict with the Supreme Court of Kansas. The Second Circuit reviewed New York's child registry laws in *Valmonte v. Bane*, 18 F.3d 992 (2d Cir. 1994). The Court used the *Mathews v. Eldridge* balancing test to determine whether Ms. Valmonte received Due Process of Law when the State of New York validated her as a child abuser and placed her on the state's child abuse and neglect registry. *Id.* at 1003. The *Mathews v. Eldridge* test balances the nature of private interests at stake with the risk of error in using greater procedural safeguards, with the government's interests. *Id.* (*citing Mathews v. Eldridge*, 424 U.S. 319 (1976)). In

Valmonte, the Second Circuit held that the appellant's liberty interest, which is the same as Dr. Winston's, was fairly evenly balance against the government's interest in protecting its children. *Id.* at 1004. The Court determined that the "some credible evidence" standard of review was very low and produced too great a risk of error. *Id.* Therefore, the child abuse registry statute did not provide adequate due process to the appellant. *Id.* Clearly, the law of Kansas is now in conflict with the holdings of the Second Circuit.

Kansas law in this case is also in conflict with the law of the Seventh Circuit. In *Doyle v. Camelot Care Centers*, 2002 WL 1992496 (7th Cir. 2002), the Second Circuit reviewed Illinois's child abuse and neglect registry statutes. In that case, the Illinois State Department of Children and Family Services, just as the SRS did in Kansas, made the determination that a person was "indicated" as a child abuser in an *ex parte* proceeding. *Id.* at 10. The department needed to only have determined that there was some credible evidence to believe that the person did abuse or neglect a child. *Id.* The Seventh Circuit determined that due to the *ex parte* indication and a low evidentiary standard, there was too high of a possibility of error. *Id.* This constituted a violation of the accused's Constitutional right to Due Process of Law. *Id.*

Kansas has a child abuse and neglect registry law similar to those of New York and Illinois. As in Illinois, the Kansas department makes both the determination to substantiate and to validate an alleged perpetrator in an *ex parte* proceeding. Kansas's standard for validating an alleged perpetrator is "more likely than not." Presiding Officer Stephen E. Good, of the Kansas Office of Administrative Hearings, in its review of this case, held that the

"more likely than not" standard is "not a heavy burden." The burden is "just enough to tip the scales." Though the wording is different, as described in Officer Good's decision, Kansas's standard is on par with New York's "some credible evidence" standard. As in Illinois, a procedure with a low evidentiary standard coupled with an *ex parte* proceeding leaves too high of a margin for error. As in New York and Illinois, there needs to be a higher level of procedural safeguards prior to a person being listed as a validated perpetrator on a central registry. Dr. Winston's case should be reversed and remanded.

II. It is important for this Court to review this case because this decision not only conflicts with the decisions of two federal circuits, but it is contrary to public policy.

Public policy goes against branding Dr. Winston as a child abuser without giving him notice and his chance to be heard. This Court, in both *Gilbert v. Homar*, 520 U.S. 924 (1997) and *FDIC v. Mallen*, 486 U.S. 230 (1988), discussed what process was due to employees that had been suspended after being formally charged or indicted, but without having a pre-suspension hearing. The petitioners in both cases had post-suspension hearings. The Court determined that a formal charge was sufficient to demonstrate probable cause, therefore, a post-suspension hearing would suffice to guarantee due process. *Gilbert,* 520 U.S. at 934. However, in both of these cases, though the petitioners were suspended from their jobs, they were not branded as criminals without having a chance to be heard. Even after being formally charged or indicted, the petitioners were still only alleged criminals. Before an alleged criminal is given the brand of criminal, that person

must have full and fair opportunity to be heard. However, in Dr. Winston's case, SRS both "substantiated" and "validated" Dr. Winston as a child abuser without giving him notice that they had done so and without giving him a chance to be heard.

In our justice system, a person is presumed innocent until proven guilty. While the law at issue here is not a criminal one, it parallels the criminal system in its punishment of those who abuse or neglect children. Those with access to the list will look at the names on a list such as this and infer that the persons listed has criminal charges brought against them. That is fundamentally unfair. It goes against the principle of the presumption of innocence. It violates Due Process protections.

III. This case should be reviewed by this Court because the child abuse and neglect registry of the State of Kansas puts into severe jeopardy privacy interests of its citizens.

As this case demonstrates, the State of Kansas can "substantiate" and "validate" perpetrators without the government giving notice to the alleged perpetrators that they are even investigated, let alone give the alleged perpetrators an opportunity to share their side of the story. This infringes not only upon an alleged perpetrators' due process rights, but their privacy rights as well.

Alleged perpetrators have an interest in keeping this information from the public to maintain their privacy. However, the alleged perpetrators' interest almost always loses out to the interest of public disclosure. This aspect of public policy is enunciated in the Freedom of Information Act. Courts, pursuant to the Act, balance four factors in

determining whether invasion of privacy is warranted: the plaintiff's interest in disclosure, the public interest in disclosure, the degree of invasion of personal privacy, and the availability of alternative means of obtaining information. 5 U.S.C. § 552(b)(6). Dr. Winston has a strong interest in not disclosing his validation as a child abuser, particularly prior to notice and a chance to be heard. With its lack of due process, as in Dr. Winston's case, the process has a Star Chamber quality to it. The public also has an interest in protecting children. However, the question here is how easily this public interest is satisfied, which parallels the last two factors courts use in balancing, that is the degree of invasion and availability of alternative means. Given the way in which our society has developed, the word "private" is in danger of becoming a hollow term. Virtually nothing in today's society is private. This holds true for Dr. Winston as well. No matter how much the state maintains that Dr. Winston's status is only available to a handful of people, this is simply not true. Given the vast amount of resources available, any curious person could learn of Dr. Winston's status as an offender. As a point of fact, by merely typing in a few words mentioned from the Supreme Court of Kansas's opinion into a search engine, the entire opinion confirming Dr. Winston's status appears. Indeed anyone wanting to learn about an "African Flesh-Eating Fish" will also be able to learn about the status of Dr. Winston. The degree of invasion today is immeasurable.

This invasion is coupled with alternative means of obtaining the requested information. The information being requested by the proper persons must strictly conform to the guidelines previously set out which means disseminating the information to the limited privileged

parties and no one else. By allowing other people to have access to this information, we only heighten the degree of invasion and undermine the alleged offender's interest in non-disclosure. It is indeterminable how many referrals Dr. Winston lost as a result of his status. Given the availability of the information, it is more than likely that the people giving referrals were not people privy to the information regarding Dr. Winston's status. It is of utmost importance that this Court provide a better method of ensuring that only the proper parties have access to the necessary information.

IV. The Supreme Court of Kansas erred by ignoring persuasive reasoning and the enunciation of public policy.

This case is not an assault upon the process of having a list of child abusers. Rather, it is a challenge to a process that is too casual. Dr. Winston presents the Court with evidence that Kansas's process of "substantiating" and "validating" child abusers violates not only Due Process of Law, but also public policy. The evidentiary standard that the state of Kansas uses to "substantiate" and subsequently "validate" a person as a perpetrator of child abuse or neglect is low, too. Yet the stigma attached, as well as the potential losses that extend from that stigma, is great. Dr. Winston went from being a top cardiothoracic surgeon to having to pick up emergency room shifts at hospitals often far from home due to being validated by SRS for child abuse. He had no opportunity to rebutt the allegation until after he had been validated when he appealed his case. Further, Dr. Winston had not even been notified that SRS was investigating him until after SRS had validated him. This goes against public policy and violates Dr.

Winston's right to Due Process of Law. The Kansas Supreme Court erred by ignoring those principles.

CONCLUSION

In light of the Second and Seventh Circuits' decisions in *Valmonte v. Bane* and *Doyle v. Camelot Care Centers*, the petitioner prays that the Supreme Court will grant its writ of *certiorari* to the Supreme Court of Kansas and so it may hear the merits of this case.

Respectfully submitted,

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October 16, 2002

APPENDIX

Opinion of the Court of July 19, 2002
In the Supreme Court of the State of Kansas:
Thomas R. Winston, M.D. v. State Department of Social and Rehabilitation Services, Case No. 87,820

Memorandum Decision Affirming Agency Action of August 10, 2001 In the District Court of Johnson County

Final Order of September 21, 2000
Before the State Appeals Committee

Initial Order of March 8, 2000
Before the Office of Administrative Hearings

IN THE SUPREME COURT OF THE
STATE OF KANSAS

No. 87,820

THOMAS R. WINSTON, M.D.,

Appellant,

v.

STATE DEPARTMENT OF SOCIAL AND
REHABILITATION SERVICES,

Appellee.

SYLLABUS BY THE COURT

1.

An appellate court, in reviewing an agency action, is limited to ascertaining from the record whether there is substantial competent evidence to support the agency findings. Substantial evidence is evidence which possesses both relevance and substance and which furnishes a substantial basis of fact from which the issue can reasonably be resolved.

2.

This court reviews an appeal from an agency's action under the Kansas Act for Judicial Review and Civil Enforcement of Agency Actions, K.S.A. 77-601 *et seq.*, as though the appeal had been made directly to this court and is subject to the same limitations of review as the district court.

3.

Appellate courts shall give deference to an agency's interpretation of its own regulation. An agency's interpretation of its own regulation will not be disturbed unless

the interpretation is clearly erroneous or inconsistent with the regulation. The appellate court will not, however, abdicate its responsibility of judicial oversight in reviewing agency actions as a result of this deference.

4.

The standard for evaluating procedural due process claims is discussed and applied.

5.

In administrative proceedings conducted under the Kansas Administrative Procedure Act, K.S.A. 77-501 *et seq.*, the presiding officer is not bound by the technical rules of evidence, and evidence need not be excluded solely because it is hearsay. K.S.A. 77-524(a).

Appeal from Johnson district court; JOHN P. BENNETT, judge. Opinion filed July 19, 2002. Affirmed.

Allan E. Coon, Norton, Hubbard, Ruzicka & Kreamer L.C., of Olathe, argued the cause and was on the brief for appellant.

Paula B. Hurt, Kansas Department of Social and Rehabilitation Services, of Overland Park, argued the cause and was on the brief for appellee.

The opinion of the court was delivered by

LOCKETT, J.: Appellant Thomas R. Winston, M.D., appeals the district court's order affirming the final administrative order of the Kansas Department of Social and Rehabilitation Services' (SRS) State Appeals Committee which affirmed the SRS presiding officer's order finding that appellant physically abused his son and emotionally abused his son and daughter. Appellant claims

(1) SRS failed to follow prescribed procedures; (2) the procedures employed by SRS created an unconstitutional condition upon his due process right to be heard; (3) he was deprived of due process; (4) the doctrine of res judicata barred subsequent proceedings; (5) the testimony of unsubstantiated allegations was improperly admitted into evidence; (6) the findings of physical and emotional abuse were not supported by substantial evidence; and, (7) the presiding officer's rulings were arbitrary and capricious.

Thomas Winston's twin children, D.W. and M.W., were born May 19, 1989. Winston is a cardiothoracic surgeon. Winston and his wife Julia separated in March 1998. When Julia filed for divorce, she alleged incompatibility and requested that she be given custody subject to reasonable visitation rights. The divorce was finalized in August 1999.

In August 1998, SRS received a confidential report alleging that Winston had physically abused D.W. SRS, along with the Overland Park Police Department, began an investigation of the allegation. The specific incident being investigated occurred the weekend of August 23, 1998, while the children were visiting their father at his apartment. D.W. reported that while trying to remove a paper containing his mother's phone number from Winston's hand, Winston picked him up by the neck and pushed his face into the corner. D.W. stated that he had a hard time breathing. Winston also hit D.W. several times with his hand and a tennis shoe. M.W. was present at the time. After this incident, Julia obtained a restraining order against Winston. Winston violated the order by continuing to contact Julia by telephone.

M.W. told Detective Barbara Hohnholt and SRS social worker Sarah Byall on August 26, 1998, that her father hits both her and D.W., but that he mainly hits D.W. hard. M.W. has also observed her father sit on D.W., strangle him, and put a pillow on his face. Separately, M.W. and Julia described the events of this most recent incident of alleged abuse the same as D.W. Julia also reported that Winston had frequently beaten her and had started physically abusing the children when they were in kindergarten. She stated that Winston, in an apparent attempt to intimidate her and the children, had purchased a 2-foot African flesh-eating fish, then threatened to cut up Julia and the children and feed them to the fish. Winston had also said things to D.W. like, "I'm going to make you disappear by cutting you up into a thousand pieces," "you're no good," "your mom and I don't love you."

Julia had previously reported to police that on or about March 4, 1998, Winston had told the children that she would disappear one night and that when they woke up, she would be gone. About a week later, Winston told the children he wished Julia would drop dead. Winston has also threatened to kill Julia in front of the children. These comments obviously upset the children. Julia reported to Detective Hohnholt and Sarah Byall that on March 15, 1998, Winston was so frustrated that he threw D.W. across the room and caused D.W. to hit his head. Julia ordered Winston to leave the house and filed for divorce the next day.

On or about September 29, 1998, SRS notified Winston that he had been substantiated for abuse of D.W. See K.A.R. 30-46-10(d) and (e). Winston requested a fair hearing on October 9, 1998. One month later, SRS notified Winston that it had also validated him for abuse of D.W.

The validation was for physical and emotional abuse. See K.A.R. 30-46-10(f). Winston was validated so his name could be placed in the Kansas Child Abuse and Neglect Central Registry. The Kansas Child Abuse and Neglect Central Registry is a confidential listing of individuals who are not permitted to be employed, reside, or volunteer in Kansas child care facilities. It must be noted that, at this same time, Winston was involved in a possible criminal action arising from the alleged acts, as well as a civil divorce action.

During 5 months of not seeing his children, Winston met with the SRS case manager, and he and the children separately attended therapy. A supervised visit was finally arranged for the evening of January 12, 1999, at the Johnson County Courthouse. In addition to Winston, D.W., and M.W., Dr. Jeff Montolio, a psychologist, Roxie O'Brien, a CASA volunteer, and Greg Rainbolt, a deputy with the Johnson County Sheriff's Department, were also present. Dr. Montolio and Deputy Rainbolt were present because D.W. was afraid of Winston and had only agreed to enter the visitation room if they were present to protect him. When D.W. entered the room, he did not greet his father. D.W. sat on the opposite end of the table, diagonally, from Winston. D.W. later told Sarah Byall that '"the police had to be there so he would not hurt us,'" that he is "'very afraid'" of his father, and that his father "'violates [the] restraining order.'" D.W. also stated that Winston drives by their house, which makes him feel unsafe.

When M.W. entered the visitation room, she was hesitant, tense, and a bit apprehensive. Winston hugged M.W. and placed her on his leg, with her legs dangling between his. Winston continued to hug M.W. while she was on his lap. Her thigh was right next to Winston's

crotch. Julia stated that M.W. freaked out while they were driving home after the visit. M.W. was frantic and crying and told Julia that it was "'hard and sticking up'" and that '"he was pushing [her] up against it.'" After arriving home, M.W. went to the bathroom, took off her clothes, and asked Julia to wash the clothes. She then took a bath, went to bed, and pulled the blankets over her head. M.W. cried, curled up in a ball, did not sleep, and refused to eat or drink that night. The next morning, M.W. did not want to go to school. When Julia drove her to school, M.W. refused to go inside.

School counselor Janice Mueller finally convinced M.W. to come inside the school. M.W. was visibly upset. M.W. drew a picture of herself sitting on Winston's lap. She drew his erection and his weird smile. According to Mueller, the penis was a focal point for M.W. because she kept drawing it over and over again with the marker. M.W. told Mueller that whenever she or D.W. see this particular smile on their father, they know that he will hurt them in some way or that something bad is going to happen. M.W. also told Mueller that she was upset being on her father's lap. She felt something was happening, did not like it, and wanted to get off his lap.

On January 14, 1999, SRS received a confidential report alleging Winston had sexually abused M.W. during the supervised visitation. On January 15, 1999, M.W. was interviewed by Jorie Siegwald at Sunflower House. During the interview, M.W. disclosed that while she was sitting on her father's lap at the visitation 3 days earlier, "his thing-a-ma-bobber grew," that his "weiner" grew and that she felt his weiner on her leg. M.W. said that her father kept pulling her closer to him and would not let her go. M.W. stated that she left her father's lap after Dr. Montolio

asked her if she would be more comfortable in a chair. During the interview, M.W. drew a picture of herself sitting on Winston's lap. The drawing appears to depict an erect penis. M.W. also reported that her father had hit her and her brother and had left hand prints and bruises on them. M.W. stated that once her father threw a sack of dog food at her mother and that on other occasions Winston had hit her mother. M.W. has also written about the abuse in her journal at school.

On March 29, 1999, Detective Ed McGillivray interviewed Winston regarding the incident with M.W. Winston denied having an erection during the visit and suggested that his daughter may have mistook his wallet and car keys, which he keeps in his front pocket, for his penis. Winston suggested that M.W. made these statements because she was being coached by Julia.

On April 2, 1999, SRS notified Winston that it had substantiated and validated him for the abuse of M.W. On April 25, 1999, it was determined that there was insufficient evidence to establish a criminal charge against Winston for the alleged sexual abuse of M.W.

On May 18, 1999, SRS notified Stephen E. Good, the presiding officer assigned to the appeal in the D.W. case, that it was withdrawing its finding of validation on the child abuse of D.W. and was preparing an amended finding of unsubstantiated abuse. Presiding Officer Good notified Winston of the withdrawal of the finding and informed him that his appeal would be dismissed as moot. On May 28, 1999, Winston withdrew his appeal.

On May 20, 1999, Winston filed an untimely request for a fair hearing on the allegations relating to M.W. SRS opposed the fair hearing because it was untimely

requested. The presiding officer in that case was also Stephen E. Good. Good denied SRS's motion to dismiss the appeal.

On or about August 3, 1999, SRS sent a notice of substantiation and validation to Winston regarding the physical and emotional abuse of D.W. and an amended notice of substantiation and validation regarding the sexual and emotional abuse of M.W. Winston appealed, requesting a fair hearing in both cases. The appeals were consolidated.

Winston then filed a motion to dismiss the findings regarding D.W., claiming that refiling of these charges was arbitrary and capricious. The motion was denied. An administrative hearing was conducted on February 15, 16, and 18, 2000. At the hearing, evidence was presented that D.W. and M.W. attended a weekly divorce support group in fourth grade facilitated by Janice Mueller. D.W. shared with the group that his dad hit him and threatened to kill him and the rest of his family. Mueller observed that D.W. had fear in his face when he said this. According to Mueller, D.W.'s comments were spontaneous and did not appear to be coached. Mueller observed that since Winston moved out of the home, the children have "come out of their shells."

Sharon Cohen, a friend of Winston and Julia, testified that in September 1996, she received a frantic telephone call from Julia that Winston was choking and throwing D.W. against the wall. Cohen spoke with Winston. Winston complained about what D.W. had done. Cohen testified that she reminded Winston that D.W. was a child and that he was an adult, then told him he was out of control, and

suggested that he needed to leave the house and obtain counseling.

Winston testified that he had told Cohen that D.W. had hit his head on the card table while the two of them had been wrestling for fun. He denied ever telling Cohen that he had hit D.W. or that he (Winston) was out of control. He testified that Cohen lied because she was a good friend of Julia and Julia's lawyer, and because after his separation from Julia he had cancelled an insurance policy he had purchased from Cohen's husband.

Winston testified that the March 1998 incident, which led to his separation from Julia, occurred differently than Julia reported. D.W. has attention deficient hyperactivity disorder (ADHD) and oppositional behavior. On that day, D.W.'s medication had worn off. D.W. refused to allow Winston to enter the kitchen of the home and was very distraught over the result of a basketball game. Winston had been paged by the hospital. After spending 20 minutes trying to calm down D.W., Winston stepped over D.W., who had been blocking the doorway by sitting in it, and went to the phone. Winston testified that D.W. began pushing Winston and at some point D.W. fell when his feet slid from underneath him on the wooden floor. D.W. then ran to Julia, who accused Winston of throwing D.W. against the wall and ordered Winston to leave.

Winston denied abusing D.W. during the visitation at his apartment. Winston testified that when he picked up the children, he noticed that D.W. was "coming off" his medication. Winston testified that Julia did not regularly administer D.W's medication. At the apartment, D.W. became upset that M.W. had given Winston Julia's cell phone number. D.W. took the piece of paper on which the

number was written and played "keep-away" for 15 minutes. Winston needed to contact Julia so that he could drop the children off and answer his page to go the hospital. Winston finally recovered the piece of paper, and while dialing the number, D.W. jumped on his back and fell to the floor. Winston testified he knelt down, put his hand on D.W.'s chest, and told D.W. to settle down. Winston stated he then took the children back to Julia's. Julia did not mention this alleged incident at a court hearing for maintenance on the following Monday. Julia's request for maintenance was denied. Neither Sarah Byall nor Detective Hohnholt observed bruises on D.W. as a result of this incident.

As for the allegation relating to the supervised visitation, Winston continued to deny it. Winston admitted that M.W. sat on his lap during the visitation, but denied that he was sexually stimulated or had an erection. None of the individuals in the room at the time of the visitation saw Winston exhibit any inappropriate behavior toward M.W.

In his March 8, 2000, initial order, Presiding Officer Good affirmed SRS's substantiation and validation of Winston regarding the physical abuse of D.W. and the emotional abuse of D.W. and M.W. Good reversed the substantiation and validation of Winston for the sexual abuse of M.W. Winston appealed and SRS cross-appealed the presiding officer's findings to the State Appeals Committee. See K.A.R. 30-7-78.

In a final order issued September 21, 2000, the State Appeals Committee restated the findings of fact as stated in the initial order and adopted the presiding officer's conclusions of law.

Winston filed a petition for review in Johnson County District Court on October 12, 2000. The district court upheld the findings of the presiding officer and the State Appeals Committee. Winston filed a timely notice of appeal. This court has jurisdiction over this case by transfer on its own motion pursuant to K.S.A. 20-3018(c).

DEFICIENCIES IN SRS PROCEDURES

Winston contends there were statutory and constitutional deficiencies in the procedures used by SRS in substantiating and validating him for emotional and physical abuse of D.W. Winston alleges: (1) SRS failed to follow prescribed procedures; (2) the procedures employed by SRS created an unconstitutional condition upon Winston's due process right to be heard; (3) Winston was deprived of due process because SRS failed to follow its internal procedures and because SRS made its initial findings of abuse against D.W. before Winston was given notice that civil proceedings had been instituted against him or given an opportunity to be heard; (4) the doctrine of res judicata bars the subsequent proceedings against D.W.; and (5) the testimony of unsubstantiated allegations was improperly admitted into evidence.

This appeal is pursuant to the Kansas Act for Judicial Review and Civil Enforcement of Agency Actions (KJRA), K.S.A. 77-601 *et seq.*, which allows the district court to grant relief *only* if it determines any one or more of the following:

> "(1) The agency action, or the statute or rule and regulation on which the agency action is based, is unconstitutional on its face or as applied;

"(2) the agency has acted beyond the jurisdiction conferred by any provision of law;

"(3) the agency has not decided an issue requiring resolution;

"(4) the agency has erroneously interpreted or applied the law;

"(5) the agency has engaged in an unlawful procedure or has failed to follow prescribed procedure;

"(6) the persons taking the agency action were improperly constituted as a decision-making body or subject to disqualification;

"(7) the agency action is based on a determination of fact, made or implied by the agency, that is not supported by evidence that is substantial when viewed in light of the record as a whole, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this act; or

"(8) the agency action is otherwise unreasonable, arbitrary or capricious." K.S.A. 77-621(c).

The party asserting the agency's action is invalid bears the burden of proving the invalidity. K.S.A. 77-621(a)(1).

An appellate court, in reviewing an agency action, is limited to ascertaining from the record whether there is substantial competent evidence to support the agency findings. *Sokol v. Kansas Dept. of SRS,* 267 Kan. 740, Syl. ¶ 3, 981 P.2d 1172 (1999). "Substantial evidence is evidence which possesses both relevance and substance and which furnishes a substantial basis of fact from which the issue can reasonably be resolved." *Kansas Dept. of SRS v.*

Paillet, 270 Kan. 646, Syl. ¶ 2, 16 P.3d 962 (2001). This court reviews an appeal from an agency's action under the KJRA as though the appeal had been made directly to this court and is subject to the same limitations of review as the district court. *Sokol,* 267 Kan. at 746, *U.S.D. No. 443 v. Kansas State Board of Education,* 266 Kan. 75, 81, 966 P.2d 68 (1998). If the issue is a question of law, this court has unlimited review. *Murphy v. Nelson,* 260 Kan. 589, 594, 921 P.2d 1225 (1996).

Failure to Follow Prescribed Procedures

Pursuant to K.S.A. 77-621(c)(5), an agency's failure to follow prescribed procedures is a ground for granting relief under the KJRA. Winston contends SRS failed to follow a prescribed procedure in not providing Winston with an opportunity to be interviewed prior to being substantiated and validated for abuse of D.W. K.A.R. 30-46-13(a) provides that "[e]ach alleged perpetrator shall have an opportunity to be interviewed before a finding is issued validating a perpetrator."

Appellate courts shall give deference to an agency's interpretation of its own regulation. *Reed v. Kansas Racing Com'n,* 253 Kan. 602, 610, 860 P.2d 684 (1993). "An agency's interpretation of its own regulation will not be disturbed unless the interpretation is clearly erroneous or inconsistent with the regulation." *Murphy,* 260 Kan. at 595. The appellate court will not, however, abdicate its responsibility of judicial oversight in reviewing agency actions as a result of this deference. *Bruns v. Kansas State Bd. of Technical Professions,* 255 Kan. 728, 729, 877 P.2d 391 (1994).

After the confidential report of abuse to D.W. was received by SRS, SRS jointly investigated the allegation with the Overland Park Police Department. Both Detective Hohnholt and Sarah Byall interviewed D.W., M.W., and Julia. Detective Hohnholt attempted to contact Winston by phone and was unable to reach him. Winston did, however, return Detective Hohnholt's calls. After Detective Hohnholt left a message that she was trying to contact Winston about the allegation of abuse, Winston's attorney, Jim O'Hara, called Detective Hohnholt. A meeting was set up for September 2, 1998, but Winston was unable to keep the appointment. O'Hara then referred Detective Hohnholt to Tom Erker. Erker advised Detective Hohnholt that he was not currently representing Winston but that he probably would be soon. Erker later contacted Detective Hohnholt indicating that he was representing Winston and that he would like to set up an appointment; however, Erker did not follow through and schedule an appointment. Detective Hohnholt never informed Winston, O'Hara, or Erker that the results of the investigation would be used by SRS. Winston testified that he had no reason to believe that Detective Hohnholt was gathering information for SRS.

On or about September 29, 1998, SRS notified Winston that he had been substantiated for abuse of D.W. On October 8, 1998, Winston left a message for Sarah Byall, stating that he had not been interviewed, that he was going to fight her and the allegation of abuse "110%" of the way, and that his attorney was "'going to sue the pants off'" Byall because he had been substantiated without being interviewed. On October 9, 1998, Winston again called Byall and left a message stating, "'I demand that you call me back before 10 a.m. this morning . . .

[Y]ou have no idea who you are dealing with . . . [Y]ou are on quicksand young lady and you better watch out because I intend to fight this every inch of the way.'" Winston testified that these messages were his request for an interview. Byall did not return Winston's calls because she believed the messages were threatening. Byall's supervisor informed her that she need not respond to threatening calls.

On October 9, 1998, Winston requested a fair hearing. In his request, Winston acknowledged that the district attorney was investigating the allegations and requested a stay of the proceedings in the SRS case because of his Fifth Amendment privilege against self-incrimination.

In his March 8, 2000, initial order, Presiding Officer Good found that Winston had been provided an opportunity to be interviewed by Detective Hohnholt. To support his decision that Detective Hohnholt was a proper person to provide the opportunity for an interview, the presiding officer relied upon K.A.R. 30-46-13(a), noting that the regulation does not mandate that the opportunity to be interviewed be provided by an SRS employee. The presiding officer also relied upon Section 2323 of the Children and Family Services Policy and Procedure Manual (PPM). Section 2323 provides: "A perpetrator cannot be substantiated unless that person has been afforded an opportunity to be interviewed by SRS, *a law enforcement officer* or a duly appointed member of a multidisciplinary child protection team." (Emphasis added.) The State Appeals Committee adopted this finding.

The district court ruled that an alleged perpetrator's opportunity to be interviewed may also be provided by law enforcement. In making this ruling, the district court

relied upon K.A.R. 30-46-13(a) and K.S.A. 38-1523(b), which provide that law enforcement and SRS shall conduct a joint investigation of child abuse and neglect reports and that the information obtained should be freely exchanged between the two agencies. The court reasoned that K.A.R. 30-46-13(a) and K.S.A. 38-1523(b) together supported SRS's position that the opportunity for an interview can be afforded to an alleged perpetrator by law enforcement.

A joint investigation is only authorized under K.S.A. 38-1523(b) when the report of child abuse or neglect indicates that there is serious physical injury, serious deterioration, or sexual abuse to the child and that action may be required to protect the child. Winston asserts a joint investigation was not authorized in this case because there was no evidence that D.W. suffered any physical injury. We disagree. The confidential report indicated that D.W. had been "thrown across the room by his father, hit 10 or more times and grabbed around the throat." Although the caller did not know whether D.W. had any marks or bruises from the incident, the report indicated that serious physical injury was possible, if not probable. This report sparked the joint investigation and a joint investigation was authorized under these facts.

Winston argues the interview could not be delegated to law enforcement because it is not provided for in the statutes or regulations. Furthermore, Winston asserts that even if SRS had the authority to delegate this task to law enforcement, the delegation would be unconstitutional as a violation of separation of powers.

Winston cites to Section 2311 of the PPM in support of his contention that law enforcement cannot provide an

opportunity to be interviewed. Section 2311 lists the reasons for not interviewing a relevant party, such as the alleged perpetrator. One reason for not conducting an interview is if the party refused to talk with the *worker*. Winston argues that this section of the PPM demonstrates that an SRS worker has the sole authority to conduct the interview. This reasoning is flawed. The list is not all-inclusive and does not conflict with Section 2323, which provides that a perpetrator cannot be substantiated unless he or she has been given an opportunity to be interviewed by SRS, a law enforcement officer, or a duly appointed member of a multidisciplinary child protection team. Allowing law enforcement officers to interview an alleged perpetrator is not against SRS's prescribed procedures.

Winston also notes that the presiding officer held that the police officers were not agents of SRS and refused to admit the deposition testimony of the officers into evidence at the hearing. Winston contends it is illogical that the officers were agents of SRS for the purpose of conducting an interview but could not testify about that interview. Sarah Byall testified that in a joint investigation, if the interview had been successfully scheduled she would have been present.

When Winston requested the fair hearing, the police were investigating the incident. Winston implied that he intended to invoke his Fifth Amendment privilege to avoid self-incrimination. SRS's practice of allowing the police to interview alleged perpetrators is logical. First, it avoids interference with the criminal investigation. Secondly, an SRS interview would not accomplish more, because the alleged perpetrator could still invoke his Fifth Amendment right. An individual's Fifth Amendment right to avoid self-incrimination may be invoked in any proceeding, including

civil or administrative. *In re Investigation into Homicide of T.H.*, 23 Kan. App. 2d 471, 474, 932 P.2d 1023 (1997). Thus, it was not illogical for the presiding officer to find the officers were not agents of SRS when admitting their depositions, but allowing SRS to rely upon law enforcement to provide Winston an opportunity to be interviewed. SRS did not fail to follow prescribed procedures, nor are its procedures in violation of Kansas law.

Unconstitutional Condition

Winston contends SRS's procedure of relying upon law enforcement to schedule or conduct an interview violates his due process rights because it requires him to relinquish his Fifth Amendment privilege to avoid self-incrimination.

As noted previously, the Fifth Amendment privilege to avoid self-incrimination can be invoked in civil and administrative proceedings. 23 Kan.App.2d at 474. Thus, Winston's contention that if SRS were required to provide the opportunity to be interviewed his right to be heard would not be conditioned upon the relinquishment of his Fifth Amendment right is erroneous. Any information obtained during an interview with SRS could be used in any criminal charge arising out of the incident. If SRS had requested an interview, Winston could still have argued that his right to be heard was conditioned upon relinquishment of his Fifth Amendment right.

We previously recognized in determining when a stay in a civil proceeding should be issued, that a defendant has no absolute right not to be forced to choose between testifying in a civil matter and asserting his or her Fifth Amendment right. See *State ex rel. Stovall v. Meneley*, 271

Kan. 355, Syl. ¶ 4, 22 P.3d 124 (2001). The same reasoning applies here. SRS is only mandated to provide the alleged perpetrator an opportunity to be interviewed. Winston's contention that relying upon law enforcement to provide an opportunity to be interviewed results in an unconstitutional condition is erroneous.

Violation of Due Process Rights

Winston also alleges his due process rights were violated. Relief for this allegation is provided pursuant to K.S.A. 77-621(c)(1). Winston first alleges that SRS's failure to follow its own internal procedures deprived him of his right to due process. We need not address this argument because we have determined that SRS followed its prescribed procedures.

Secondly, Winston contends his due process rights were violated when he did not receive notice that civil proceedings had been instituted against him and was not given an opportunity to be heard prior to SRS rendering its findings of substantiation and validation for the alleged abuse of D.W.

This court has set forth the standard for evaluating a procedural due process claim on numerous occasions:

> "The basic elements of procedural due process are notice and an opportunity to be heard at a meaningful time and in a meaningful manner. *Kennedy v. Board of Shawnee County Comm'rs*, 264 Kan. 776, 797-98, 958 P.2d 637 (1998). In reviewing a procedural due process claim the court must first determine whether a protected liberty or property interest is involved and, if it is, the court must then determine the nature and extent

> of the process which is due. [*Murphy,* 260 Kan. at 598.] A due process violation can be established only if the claimant is able to establish that he or she was denied a specific procedural protection to which he or she is entitled. The question of the procedural protection that must accompany a deprivation of a particular property right or liberty interest is resolved by a balancing test, weighing (1) the individual interest at stake, (2) the risk of erroneous deprivation of the interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards, and (3) the State's interest in the procedures used, including the fiscal and administrative burdens that the additional or substitute procedures would entail. *Mathews v. Eldridge,* 424 U.S. 319, 335, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976); *Murphy,* 260 Kan. at 598-99. The question of what process is due in a given case is a question of law. 260 Kan. 589, Syl. ¶ 2." *State v. Wilkinson,* 269 Kan. 603, 608-09, 9 P.3d 1 (2000).

SRS contends Winston did not have a protected property interest, *i.e.,* Winston's medical practice as a cardiothoracic surgeon would not be affected by a validation, although it recognized he may have had a protected liberty interest. SRS asserts, however, that after balancing the interests involved, Winston received the level of due process to which he was entitled.

In order to determine whether the substantiation and validation by SRS deprived Winston of a particular property right or liberty interest, a definition of the terms involved is necessary. An incident of abuse or neglect is "substantiated" if there is enough evidence that a reasonable person could conclude that an alleged incident of child

abuse or neglect occurred, using the "more likely than not" standard. See K.A.R. 30-46-10(d). A person is "substantiated" as a perpetrator of child abuse or neglect if a report of abuse or neglect is substantiated and there is enough evidence, using the "more likely than not" standard, that a reasonable person could conclude who was responsible. See K.A.R. 30-46-10(e).

> "(f) 'Validated' means a determination by the department of social and rehabilitation services that a substantiated perpetrator poses a danger to children and should not be permitted to operate, reside in, be employed by, or volunteer in a home or facility for the care of children licensed under provisions of article 5 of chapter 65 of the Kansas statutes annotated." K.A.R. 30-46-10(f).

SRS has established criteria for validating perpetrators. A person who meets these criteria is validated and his or her name is entered into the Kansas Child Abuse and Neglect Central Registry. PPM section 2324. The definitions of these terms accompany the notice sent to confirmed perpetrators.

Winston alleges he was deprived of a protected liberty interest. He appears to contend that his protected liberty interest is his ability to freely maintain or work in a child care facility and to avoid the stigma which would accompany his name erroneously being placed on the statewide registry. This court has recognized that a liberty interest may be deprived without due process if the person's standing in the community is damaged, if his or her reputation, honor, or integrity are called into question, or if a stigma or other disability attaches that infringes upon his freedom to obtain employment. *Kansas Racing Management, Inc. v. Kansas Racing Comm'n,* 244 Kan. 343,

356, 770 P.2d 423 (1989); *Sinclair v. Schroeder*, 225 Kan. 3, 9, 586 P.2d 683 (1978). Because validation involves listing an individual on the Kansas Child Abuse and Neglect Central Registry and prohibits him or her from being employed, operating, residing, or volunteering in a child care facility, a protected liberty interest is involved.

Thus, this court must determine whether the process afforded Winston was sufficient to comply with due process of law. K.S.A. 2001 Supp. 75-3306 provides any interested party a method of appealing decisions and final actions of SRS agents and employees. SRS has further set forth the procedures for appeal in K.A.R. 30-7-64 *et seq.*

SRS regulations do not specifically provide that an alleged perpetrator must be given notice prior to substantiation or validation. The regulations only require that an alleged perpetrator be provided an opportunity to be interviewed before being validated. See K.A.R. 30-46-13. Notice is only required when SRS renders a decision to validate a perpetrator. K.A.R. 30-46-15. The notice must be in writing, include the reasons for the finding, and inform the confirmed perpetrator of his or her right to appeal the decision. K.A.R. 30-46-15. Thus, under SRS regulations, notice is not specifically mandated prior to validation.

The district court held that Winston received due process under the procedures employed. The district judge reasoned that the action which could cause damage to Winston's reputation, being listed in the registry, would not occur until Winston exhausted his appeals or failed to exercise his right to take part in the appeals process. See K.A.R. 30-46-16. He noted that Winston had full disclosure

of the SRS investigative file, had subpoena power, conducted discovery, and had a full evidentiary hearing. This reasoning is logical.

This is not, as Winston seems to contend, a case in which the later proceedings are being evaluated to determine whether Winston received due process overall. Instead, this is a case in which the deprivation of the liberty interest did not occur until Winston exhausted his appeals or failed to appeal SRS's finding. Until there is interference with a liberty interest, there is no guarantee of due process. See *Murphy,* 260 Kan. at 598. As long as Winston was provided notice and an opportunity to be heard at a meaningful time and in a meaningful manner before his liberty interest was abridged, due process requirements have been met.

Winston was given ample notice of his right to appeal SRS's decision and ample opportunity to tell his side of the events and to put forth witnesses in his favor. Placement on the Child Abuse and Neglect Central Registry would not occur until Winston had been provided notice and an opportunity to be heard. K.A.R. 30-46-16. Compare *Goss v. Lopez,* 419 U.S. 565, 42 L. Ed. 2d 725, 95 S. Ct. 729, (1975) (10 day *suspension* of students without a hearing violated due process).

In terms of the balancing test, the individual interest at stake prior to being listed in the Kansas Child Abuse and Neglect Central Registry is arguably little. The validation and substantiation of Winston does not infringe upon his liberty interest until he has exhausted his appeals. If he had not appealed, his liberty interest would not have been infringed until he failed to exercise his right to appeal. The risk of erroneous deprivation of the interest

is also minimal because SRS is required to use the "more likely than not" standard in determining whether an individual should be substantiated, and there is little interest at stake regarding a substantiation. The State's interest, however, is great in terms of its need to address the issue quickly and efficiently. Therefore, Winston's due process rights have not been violated.

Res Judicata

Winston contends the doctrine of res judicata barred the proceedings concerning D.W. because SRS had previously withdrawn its finding of validation on D.W. and amended its finding to unsubstantiated. SRS contends res judicata does not bar the proceedings because SRS reinstated the findings of abuse without there having been any prior judicial determination.

Res judicata (claim preclusion) prevents relitigation of previously litigated claims and consist [sic] of the following four elements: (1) same claim; (2) same parties; (3) claims were or could have been raised; and (4) a final judgment on the merits. *Neunzig v. Seaman U.S.D. 345,* 239 Kan. 654, Syl. ¶ 1, 722 P.2d 569 (1986); *In re Tax Protests & Grievances of Curtis Machine Co.,* 26 Kan. App. 2d 395, 397, 985 P.2d 725, *rev. denied* 268 Kan. 847 (1999). "Res judicata precludes a second administrative proceeding when the first administrative proceeding provides the procedural protections similar to court proceedings when an agency is acting in a judicial capacity." *Parker v. Kansas Neurological Institute,* 13 Kan. App. 2d 685, 686, 778 P.2d 390, *rev. denied* 245 Kan. 785 (1989). See *Neunzig,* 239 Kan. at 660.

SRS withdrew its finding of validation for abuse of D.W. prior to a hearing and amended its finding to unsubstantiated. It appears from the record that the reason for the withdrawal was that SRS believed it had already validated Winston for the abuse of M.W. because Winston had not requested a fair hearing in M.W.'s case and the time for doing so had expired. When the presiding officer allowed Winston's untimely request for a fair hearing to stand in M.W.'s case, SRS refiled against Winston, once again substantiating and validating him for the abuse of D.W.

Regardless of the reason for the withdrawal and reinstatement of this finding, however, the proceedings up to that point had not provided the similar due process protections as those afforded by the judicial process. See *Dallinga v. Center Township,* 19 Kan. App. 2d 482, 483-84, 871 P.2d 1293, *rev. denied* 255 Kan. 1000 (1994) (administrative action is res judicata only when proceeding affords type of due process protections found in judicial process). At the time SRS withdrew its finding of validation, Winston had not yet been afforded the fundamental elements of due process, notice, and a meaningful opportunity to be heard. Thus, res judicata does not apply in this case.

Winston asserts that SRS cannot have it both ways and that if due process were afforded Winston as required, res judicata must apply. We disagree with this assertion. Winston was afforded the required level of process when he was given notice of SRS's finding and had the opportunity to appeal the decision and have a full hearing conducted.

Testimony of Unsubstantiated Allegations

Winston contends the presiding officer erroneously admitted and considered evidence of events other than the event that allegedly occurred on the weekend of August 23, 1998, in affirming the substantiation and validation of Winston for the emotional and physical abuse of D.W. Winston relies upon Section 2324 of the PPM in making this claim. Section 2324 provides:

> "To validate an adult for inclusion in the child abuse and neglect central registry, the person must:
>
> (A) Have been substantiated as a perpetrator using the preponderance of the evidence standard, 'more likely than not';
>
> (B) Have committed one of more of the following qualifying acts:
>
> Any non-accidental or intentional act or failure to act toward a child which:
>
> . . . .
>
> 4. Results in serious or permanent impairment of the child's emotional, intellectual or social development or functioning.
>
> 5. Results in the child experiencing terror or intense dread.
>
> . . . .
>
> 8. Would likely have resulted in any of the outcomes in '1' through '7' above except discovery or intervention or accidental circumstances intervened.

> 9. Exhibits a pattern of continuing, repeated, or progressively more severe abuse or neglect. For purposes of determining whether a pattern exists, prior substantiations may include substantiation by Kansas or any other state, federal enclave or Native American tribe or association using the standards of that state or entity. Verified evidence of a prior conviction of a crime against a child may be counted as a prior substantiation of child abuse or neglect.
>
> . . . .
>
> (C) Have been given notice of the department's decision to validate the person for the purpose of placing their name in the child abuse and neglect central registry, and
>
> > the perpetrator has not timely appealed the decision, OR the perpetrator has appealed the decision and was not sustained by the highest level to which the decision was appealed."

Winston argues that Section 2324 limits SRS to considering only prior convictions and prior substantiations as being competent evidence in establishing a pattern of abuse. He contends that in order to protect the accused from allegations that are not supported by substantial evidence, other allegations are not allowed to be considered. This claim is grounded upon the theory that it was arbitrary and capricious for the presiding officer to admit and rely upon these unsubstantiated allegations, a ground for relief under K.S.A. 77-621(c)(8).

SRS asserts that it is not precluded from using evidence that is obtained during the investigation of an alleged incident of abuse in determining whether there is evidence to support substantiation. As SRS points out, if Winston's argument were adopted, SRS would be required to ignore any evidence discovered during the investigation that related to prior unsubstantiated or even unreported allegations of abuse. This would be an illogical result. Section 2324 of the PPM does not prohibit SRS from using things discovered during investigation of a specific incident. Winston had access to SRS investigative files. Sarah Byall testified in her deposition that Winston was validated because he satisfied all the above quoted bases for validating a perpetrator under Section 2324 of the PPM. There is no indication that any of the evidence presented at the hearing was a surprise. Thus, there is nothing that would preclude this information from being used to substantiate and validate a perpetrator where the alleged perpetrator had notice of the information.

SUBSTANTIAL EVIDENCE OF ABUSE

Winston contends there was not substantial evidence to support the findings that he physically abused D.W. and emotionally abused D.W. and M.W. SRS asserts to the contrary, contending there was substantial evidence to support these findings.

As stated above, substantial evidence is such legal and relevant evidence as a reasonable person would consider sufficient to support a conclusion. See *Sokol,* 267 Kan. at 746. In determining whether there is sufficient evidence, the appellate court may not reweigh the facts or substitute its judgment for that of the agency. 267 Kan. at

746. An agency decision that is not supported by substantial evidence is a ground for relief under the KJRA, pursuant to K.S.A. 77-621(c)(7).

Physical Abuse

Winston contends there was not substantial evidence to support the finding of physical abuse against D.W. because there was not substantial evidence establishing that any physical abuse occurred during the visitation at his apartment in August 1998. Specifically, Winston cites to the fact there was no bruising or marks that were observed as a result of the alleged abuse, that Winston's version of events is credible because D.W. has ADHD, and that Julia, who provided the majority of the background information that led to the finding, had the most to gain from providing this harmful testimony.

K.A.R. 30-46-10(j) defines physical abuse as "non-accidental or intentional action or inaction that results in bodily injury or that presents a likelihood of death or of bodily injury." Thus, the fact no marks or bruises were observed on D.W. is not conclusive in determining whether he was physically abused. D.W. told Detective Hohnholt and Sarah Byall that Winston picked him up by the neck, pushed his face into the corner, which caused him to have difficulty breathing, and hit him several times with his (Winston's) fists and with a tennis shoe. M.W. reported that Winston had picked D.W. up by the neck and pushed him face-first into the wall, and that Winston had hit D.W. so hard that day that Winston left a handprint. Julia reported that both M.W. and D.W. had told her the same about the incident. In addition to the prior abuse which Julia told Detective Hohnholt and Sarah Byall about,

M.W. and D.W. also indicated that Winston had physically abused D.W. on prior occasions, stating that he would sometimes sit on D.W., strangle him, and put a pillow over his face so he could not breathe.

There is no doubt that these facts constitute substantial evidence that supports a finding that Winston physically abused D.W.

Emotional Abuse

Winston also contends there was not substantial evidence to support the finding that he emotionally abused M.W. and D.W.

> "'Mental or emotional abuse' means acts or omissions that impair a child's social, emotional, or intellectual functioning or present a likelihood of such impairment. Emotional abuse shall include the following:
>
> "(1) Terrorizing a child, by creating a climate of fear or engaging in violent or threatening behavior toward the child or toward others in the child's presence that demonstrates a flagrant disregard for the child"; K.A.R. 30-46-10(g).

There was substantial evidence to support the finding that Winston emotionally abused both D.W. and M.W. D.W. was so terrified of his father that he refused to enter the same room during the supervised visitation in January 1999 without police protection. D.W. also reported to Sarah Byall that he was "'very afraid'" of his father. D.W.'s fear of his father was apparent to Janice Mueller during the divorce counseling group discussions. M.W.'s reaction to the visitation, as well as her journal entries, constitute substantial evidence that Winston abused M.W.

As the presiding officer noted, the evidence is overwhelming that Winston emotionally abused both children.

Mueller testified that after Julia and Winston separated she observed a change in M.W.'s and D.W.'s behavior in that they opened up to others. Winston contends that Mueller's testimony diminishes the claim that he has somehow interfered with the children's social and emotional functioning. Winston, however, misconstrues the testimony. The testimony supports the finding that Winston has impaired their social and emotional functioning. It was only after Winston was no longer a constant in the children's lives that they began to open up to others and participate.

Winston also contends that evidence supporting the finding of emotional abuse of M.W. was based on events other than the courthouse visitation and, thus, any decision that he emotionally abused M.W. was rendered without jurisdiction. This argument has already been addressed previously. During the investigation of the alleged incident of sexual abuse, evidence was discovered that would support the finding of emotional abuse. The reversal of SRS's validation of Winston for sexual abuse does not undermine the fact that evidence of emotional abuse remained. Winston was aware that SRS was validating him for the emotional abuse of M.W. Thus, it was not beyond the jurisdiction of SRS to render a finding of emotional abuse under the circumstances.

PRESIDING OFFICER'S ALLEGED ERROR

Winston contends the presiding officer's evidentiary decisions and other rulings were arbitrary and capricious and favored SRS. A ruling that is arbitrary and capricious

is a ground for relief under the KJRA pursuant to K.S.A. 77-621(c)(8). Winston cites to specific instances in his brief, which he contends demonstrate that the presiding officer acted more favorably toward SRS.

After reviewing the entire record of the hearing, there is no evidence of favoritism toward SRS or bias against Winston. The presiding officer took an open approach to the admission of evidence and applied this approach equally to both sides. Winston points out only those instances in which a ruling did not go in his favor and neglects to point out the numerous instances in which the presiding officer allowed questioning and evidence over SRS's objection.

Winston also contends in his brief that the admission of Julia's statements through the testimony of Sarah Byall and Detective Hohnholt was arbitrary and capricious. Julia did not testify at the hearing; however, Julia's statements were admitted into evidence through the reports created during the investigation and through testimony of other witnesses. The basis for Winston's objection to the admission of the evidence is that Julia refused to cooperate during her deposition and that he was deprived of an opportunity to cross-examine her because she did not testify. We find nothing in the record that indicates Winston did anything to compel Julia to submit to further questioning. The only action documented in the record was Winston's motion in limine to exclude all of Julia's testimony.

In administrative proceedings conducted under the Kansas Administrative Procedure Act, K.S.A. 77-501 *et seq.*, the presiding officer is not bound by the technical rules of evidence and evidence need not be excluded solely

because it is hearsay. K.S.A. 77-524(a). Thus, the fact the presiding officer allowed Julia's statements to be admitted into evidence through reports and testimony of others was not arbitrary and capricious. As for the fact Winston was not able to cross-examine Julia on those statements, Winston could have called Julia as a witness or obtained an order requiring Julia to comply with the discovery request and submit to a subsequent deposition. See K.S.A. 77-522. It must be noted that Julia's failure to cooperate in the deposition was the result of her and her own attorney, not as the result of action by SRS.

The presiding officer overruled Winston's objection to the admission of Julia's statements in the reports on the grounds that Winston had statutory remedies available to him, such as going to district court, as the result of Julia's failure to fully submit to examination in her deposition. The presiding officer held that it was Winston's duty to pursue those remedies.

We note that when Winston's counsel brought Julia's actions to the attention of the presiding officer, the presiding officer informed him that he would not compel Julia to respond. The presiding officer stated at the hearing that he meant to inform Winston's counsel that he, himself, did not have the physical ability to pry open Julia's mouth and make her talk and did not mean to mislead counsel about available remedies. The presiding officer also noted that Winston's counsel could have read the statutes and determined what remedies were available.

The district court, in affirming the decision and finding that Winston's due process rights had not been violated, noted that the presiding officer acted within his authority in admitting the hearsay statements of Julia

and that although this procedure resulted in Winston having the burden to produce Julia as his witness in order to examine her and test her credibility, there was no indication that Winston could not have done so. The presiding officer's rulings on the admission of evidence were not arbitrary and capricious.

Affirmed.

IN THE DISTRICT COURT OF JOHNSON COUNTY, KANSAS

CIVIL COURT DEPARTMENT

THOMAS R. WINSTON, M.D., Petitioner, vs. STATE DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES, Respondent.	)	Case No. 00CV6411 Court No. 18 K.S.A. Chapter 60

MEMORANDUM DECISION AFFIRMING AGENCY ACTION

NOW ON THIS 10 day of August, 2001 the above matter comes on to the court for decision. A hearing on the petition was conducted on July 31, 2001 and the court took the matter under advisement. The court has now reviewed the pleadings, the record on appeal, the authorities cited by the parties, and heard the arguments of counsel and therefore finds and determines as follows:

1. This is an appeal filed pursuant to K.S.A. 77-601, *et seq.*, the Act for Judicial Review and Civil Enforcement of Agency Actions. The review sought is of the adverse finding of child abuse or neglect made by SRS concerning the petitioner. This appeal is determined on review of the record made before the Department of Administration and the State Appeals Committee. No issue is raised concerning the court's jurisdiction or venue to hear the appeal and the court should entertain the appeal.

2. The petition for review was filed October 12, 2000. On September 21, 2000, the State Appeals Committee issued its Final Order adopting the Presiding Officer's Conclusions of law and affirming the Initial Order which affirmed the SRS validation that petitioner physically abused his son and that he emotionally abused both his son and daughter.

3. The reasons asserted by petitioner for relief are that the Final Order (a) is unconstitutional; (b) constitutes an erroneous interpretation or application of the law; (c) resulted from the Agency failing to follow prescribed procedure; (d) is based upon determinations of fact, made or implied by the Agency, that are not supported by evidence that is substantial when viewed in light of the record as a whole; (e) is unreasonable, arbitrary or capricious. Petitioner has the burden of proving the invalidity of the agency decision. This court will not reweigh the evidence presented at the evidentiary hearing, nor redetermine the credibility of testimony of witnesses.

4. The court's review in these cases is much like that of the Court of Appeals or Supreme Court. The court did not take evidence. The scope of review is set out in K.S.A. 77-621.

5. The court will not set out in detail the procedural history of this case except as deemed necessary to explain the ruling.

6. Petitioner seeks reversal of the finding that Dr. Winston emotionally abused MW. The petitioner contends that the record does not contain sufficient evidence to support the finding of the presiding officer and the appeal committee. Certainly, the factual findings of the Presiding Officer, Steven Good, of the Office of Administrative Hearings, if supported by

substantial evidence, show adequate evidence of emotional abuse to support the finding made regarding MW. The court has reviewed the record on appeal and finds reference in the testimony of various witnesses, and in the hearsay statements admitted, to each of the factual findings made. Ms. Byall testified that the children appeared to be very afraid of their father. Officer Hohnholt testified that the MW told her she had witnessed her father hit her brother numerous times and that he also hit her numerous times. She also testified that MW expressed fear of her father. She testified that MW told her that she saw her father sit on DW, strangle him, put a pillow over his face in addition to the hitting. MW in writings has stated that she fears her dad, that he is abusive to her mother, brother, and to her. She stated that the abuse had been occurring over several years. The presiding officer, Steven Good believed the evidence of this abuse. His order affirming the validation of emotional abuse of MW is supported by substantial evidence and should be affirmed.

7. Dr. Winston complains that because the initial confidential report which spurred the investigation by SRS involved possible sexual abuse, SRS should not have been allowed to present evidence of emotional abuse at the hearing, that this went beyond the scope of the notice of substantiation and validation sent to Dr. Winston. From the record it is clear that Dr. Winston was aware of the scope of the evidence which SRS intended to present at the hearing. There was no surprise. SRS did not exceed its jurisdiction in presenting evidence of emotional abuse.

8. Dr. Winston asserts that the finding that he physically and emotionally abused DW should be reversed. He contends that SRS failed to follow prescribed procedures and therefore he was deprived of due process. Primarily, Dr. Winston complains that he was not

afforded an opportunity to be interviewed before SRS made its findings. SRS counters that Dr. Winston was afforded an opportunity to talk to the Overland Park Police Department, and that it believes this meets the requirements for an opportunity to be interviewed. Both parties aptly briefed this issue. The court finds that the law does not require SRS to actually conduct or attempt to conduct the "opportunity" interview. SRS can rely on efforts of the police. SRS did not violate its statutory or regulatory mandates in this regard. As for the due process claim, the court has reviewed the authorities cited by the parties and finds that Dr. Winston was given notice and opportunity for hearing before the validation was effective.

K.S.A. 38-1523(b) provides that law enforcement and SRS can exchange information on investigations of suspected child abuse and neglect. K.A.R. 30-46-10(a) provides that an alleged perpetrator shall have the opportunity to be interviewed before a finding is issued by SRS validating a perpetrator. Reading these together, the court finds support for the SRS position that the opportunity for an interview can be afforded an alleged perpetrator by the police. As stated by SRS in its brief: "There is nothing in statutory law, case law, administrative regulation or agency policy that states that the social worker must be the one to afford the alleged perpetrator the opportunity to be interviewed."

Dr. Winston complains that by having the police attempt to interview him he was placed in the position of choosing between exercise of his constitutional right regarding self incrimination and defending himself in the SRS investigation. In fact, he says that when the police approached him he had no knowledge that SRS was also investigating him. While the situation forced Dr. Winston to choose as claimed, the court knows of

no law protecting him from the civil investigation while also facing possible criminal charges.

9. Dr. Winston asserts that he had no meaningful opportunity for hearing prior to SRS making its validation. SRS contends the Dr. Winston received notice of its planned action to place his name on the Registry and that he took advantage of his opportunity for *de novo* hearing. In preparation for the hearing Dr. Winston had full disclosure of SRS' investigative file, had subpoena power for witnesses, conducted discovery, and had a full evidentiary hearing, all before the validation resulted in any deprivation. The burden of proof at the evidentiary hearing was not shifted to Dr. Winston as a result of the SRS finding and validation.

10. Due process is not a technical conception with fixed content unrelated to time, place and circumstances; rather, it is flexible and calls for such procedural protections as particular to the situation. The requirements of due process are not the same in every situation. Factors to consider include the private interest that will be effected, the risk of erroneous deprivation of such interest through procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and the government's interest. See *Mathews v. Eldridge*, 96 S.Ct. 893 (1976). The private interest affected in this case is the damage to Dr. Winston's reputation, which could be significant, if knowledge of the action by SRS was made known to his community. Dr. Winston complains of a lack of notice and input before SRS made its finding and sent him notice of its intent to place him on the Registry - the action which could trigger the damage to his reputation. He proposes that requiring SRS personnel to interview him rather than relying on the police attempts would comply with due process requirements. The court finds that Dr. Winston received due process under the procedures used. Before his name was

placed on the Registry he had full opportunity to answer the allegations made by SRS. Certainly there is a risk of error even after an evidentiary hearing, but the administrative appeal procedures afford Dr. Winston not only an evidentiary hearing, but multiple levels of review. Dr. Winston points to *Goss v. Lopez*, 95 S.Ct. 729 (1975) for support of his assertion that he must be given notice of the SRS investigation and an opportunity to be heard before SRS makes its finding and validation. In *Goss* the Supreme Court affirmed the lower court ruling that students were denied due process where they were suspended without hearing prior to suspension or within a reasonable time thereafter. In this case Dr. Winston was entitled to and actually had notice and hearing prior to having his name placed on the registry. He had a hearing within a reasonable time after SRS made its findings.

11. Dr. Winston claims SRS should be barred from proceeding on its findings regarding DW based on res judicata. The court finds no support for this claim. No prior judicial determination has been shown to the court. SRS does not make judicial findings. SRS can determine whether under the law, regulations, and rules it should substantiate an allegation, validate it, and proceed to place the name of the person validated on the Registry. SRS is not foreclosed from considering evidence under the doctrine of res judicata unless the evidence has already been used and subjected to the due process review afforded as in this case. Such was not the case with the evidence until the hearing in this case.

12. Dr. Winston asserts that the finding of physical abuse of DW was not supported by substantial evidence. He points to the evidence of the August 1998 incident as being insufficient. The evidence presented at the evidentiary hearing included testimony of hitting, strangling, and shoving or throwing by Dr. Winston. While

no injuries occurred, there is no requirement of injury for the SRS finding. Under K.A.R. 30-46-10(j) physical abuse also means non-accidental or intentional action that presents a likelihood of death or of bodily injury. The evidence supports this definition. The actions of Dr. Winston described by his children and clearly accepted by the presiding officer meet the definition of physical abuse as defined for purposes of determining whether Dr. Winston should be allowed to work in a day care facility. Much of Dr. Winston's argument on this issue would have the court reweigh the evidence rather than determine whether there is sufficient evidence. This the court will not do.

13. Dr. Winston asserts that the finding of emotional abuse of DW was not supported by substantial evidence. Again, he points to a lack of evidence of actual impairment of social, emotional or intellectual functioning, but K.A.R. 30-46-10(g) also covers acts that present a likelihood of such impairment. This is a broad definition. Based upon the evidence in the record the court finds that the finding of emotional abuse should be sustained.

14. Dr. Winston asserts that without the admission of hearsay evidence offered by SRS, and the denial of admission of evidence he offered, the record would not support the findings made. He complains of unequal treatment by the presiding Officer in exercising his discretion to admit or not admit evidence. The court has reviewed the evidence admitted by the presiding officer, and specifically those rulings set out in Dr. Winston's brief. Objections to relevancy are valid objections, but ultimately the presiding officer must base his decision on relevant evidence. Therefore, even if irrelevant testimony were admitted, there would need to be a showing that the presiding officer based his decision on such evidence. Where, as here, the court has a written order which clearly sets out the facts

found by the presiding officer, the court can determine that any irrelevant testimony, even if could have influenced the presiding officer, would not have negated the legally sufficient basis for the SRS findings.

15. Dr. Winston contends that he was unfairly denied admission of evidence because of some bias on the part of the presiding officer. This concerned an attempt by Dr. Winston to admit a number of depositions of witnesses he listed. Dr. Winston sought admission of the testimony without making any showing that the witnesses were unavailable. The presiding officer sustained SRS' objection. Some of these witnesses testified later on behalf of Dr. Winston. The court finds that the presiding officer acted within the bounds of his discretion in admitting or denying admission of the exhibits, and testimony.

16. Finally, Dr. Winston objects to consideration of the testimony of Julia Winston. Ms. Winston did not testify at the hearing, but her statements to police contained in their reports, and SRS summaries contain hearsay statements which find their way into findings of fact in the Initial Order of the Presiding Officer. Dr. Winston contends that the admission of the hearsay statements of Ms. Winston should not have been admitted. SRS' response to this complaint is to point out that Dr. Winston could have called Ms. Winston as his witness. Generally, the admission of evidence at a hearing pursuant to the administrative procedures act is left to the discretion of the presiding officer. K.S.A. 77-524 provides that a presiding officer need not be bound by technical rules of evidence, but must give the parties reasonable opportunity to be heard and to present evidence, and must act reasonably without partiality. Evidence need not be excluded solely because it is hearsay. The rules of evidence which are statutory in Kansas do not apply to every proceeding. The legislature can control the application of the

statutory rules so long as due process is afforded. No law has been cited which would make admission of hearsay as authorized by K.S.A. 77-524 violative of due process. The presiding office acted within his authority in admitting the hearsay statements of Ms. Winston and thus could rely on the statements for his findings. While this procedure to some extent turns on its head the rules of evidence and in effect results in Dr. Winston having the burden to produce Ms. Winston as his witness in order to examine her and test her credibility, there is no showing that he could not have done so. In fact SRS contends that Dr. Winston had obtained a subpoena for Ms. Winston but did not execute it. This court cannot find that the procedure followed by the presiding officer pursuant to the administrative procedure act unconstitutionally denies Dr. Winston due process.

IT IS THEREFORE ORDERED that the findings and decision of the Presiding Officer and upheld by the State Appeals Committee are confirmed.

/s/ John P. Bennett
John P. Bennett, District Judge

CERTIFICATE OF MAILING

I hereby certify that on 10th day of August, 2001, a true and correct copy of the Court's Memorandum Decision, was placed in the U.S. Mail, postage prepaid, addressed to counsel/pro se litigants listed below or was placed in their attorney receptacle box located in the Clerk

of the District Court of Johnson County, Kansas, on the date of filing of this document addressed to:

Ms. Paula Hurt, Receptacle Box 180;

Mr. Allan Coon, Receptacle Box 11;

Mr. Scott Gyllenborg, Receptacle Box 385;

/s/ Arleen Schuman
Arleen Schuman
Administrative Assistant

BEFORE THE STATE APPEALS COMMITTEE
STATE OF KANSAS
STATE DEPARTMENT OF SOCIAL AND
REHABILITATION SERVICES

Thomas R. Winston, Appellant v. State Department of Social and Rehabilitation Services Respondent	)	Appeal No. 99Y0270 PS & 00Y0024 PS

FINAL ORDER

Statement of Case

On March 8, 2000, Stephen E. Good, Presiding Officer, Office of Administrative Hearings, issued an Initial Order in the fair hearing of Thomas R. Winston. The Presiding Officer affirmed the agency's validated findings that Thomas Winston physically abused D.W. and that he emotionally abused both D.W. and M.W. The Presiding Officer reversed the agency's finding that he sexually abused M.W.

Findings of Fact

1. M.W. and D.W. are the twin children of Thomas Winston and of Julia Stearn (Winston). Mr. Winston started being physically abusive to the children when they were in kindergarten. They are currently in fifth grade. He frequently beat up his wife Julia. In an apparent attempt to intimidate his wife and the children, Mr. Winston bought a two-foot African flesh-eating fish. The fish was kept in a tank in the basement. Mr. Winston threatened

to cut up his wife and their children, feed them to the fish and no one would know.

2. In September 1996 Sharon Cohen, a friend of Thomas and Julia Winston, received a frantic telephone call from Julia: Tom was choking D.W. and throwing him against the wall. Ms. Cohen spoke with Mr. Winston who complained what D.W. had done. Ms. Cohen reminded Mr. Winston that D.W. was the child and he was the adult. She told him he was out of control. She suggested he needed to leave the house and obtain counseling.

3. On or about March 4, 1998 Mr. Winston told the children that their mother would disappear one night, that they would wake up, and she'd be gone. About a week later, Mr. Winston told the children he wished their mother would drop dead. Mr. Winston has threatened, in front of the children, to kill their mother. He has said things to D.W. like "I'm going to make you disappear by cutting you up into a thousand pieces", "You're no good," "Your mom and I don't love you."

4. On March 15, 1998 Thomas Winston got so frustrated he threw D.W. across the room causing D.W. to hit his head. Ms. Stearn (Winston) took this as the last straw. She told Mr. Winston to leave or she'd call the police. She had finally had enough of his abuse. She filed for divorce on March 16, 1998. It was final in August 1999.

5. A letter written by M.W. sometime in about Spring 1998 states, "My dad said he wants my mom to go to hell. He threatens to kill my brother or my mom. He hits my brother and me very hard. It makes where he hits us very, very, very red. He throws my brother across the room very, very, very, very hard. He yells at everyone at his job and at home."

6. On August 23, 1998, while the children were visiting their father at his apartment, D.W. tried to remove a paper containing his mom's telephone number from his dad's hand. Mr. Winston picked D.W. up by his neck and pushed his face into the corner. D.W. had a hard time breathing. Mr. Winston hit D.W. several times with his hand and with a tennis shoe. M.W. observed this episode.

7. M.W. told police detective Hohnholt and social worker Byall on August 26, 1998 that her father hits them both, but that he mainly hit D.W. and hits him hard. In addition M.W. has seen her father in the past sit on D.W., strangle him and put a pillow on his face. D.W. separately reported the same thing to Detective Hohnholt and to Ms. Byall on August 26, 1998; and Julia Stearn reported the same thing to the investigators on August 27, 1998.

8. Following the incident with D.W. on August 23, 1998, Ms. Stearn obtained a restraining order against Mr. Winston. He violated this order by continuing to contact Ms. Stearn by telephone. He apparently stopped the calls after he was told by Leawood police officer Robbins that phone calls to the residence violated the order.

9. Overland Park detective Bobbie Hohnholt attempted to speak with Thomas Winston on August 27, 1998. She ended up leaving a message that it was about alleged child abuse. Mr. Winston's attorney Jim O'Hara contacted Detective Hohnholt and they arranged an interview with Mr. Winston on September 2, 1998. On August 31, 1998 Mr. O'Hara canceled the September 2 appointment, and he told Detective Hohnholt that he (Mr. O'Hara) had referred Mr. Winston to attorney Tom Erker who handles criminal matters. When Detective Hohnholt contacted Mr. Erker, he said he was not

yet representing Mr. Winston but expected to do so soon. Mr. Erker later called Detective Hohnholt and said he was representing Mr. Winston and wanted to meet regarding the allegations. Neither Mr. Erker nor Mr. Winston got back with Detective Hohnholt, even though she attempted to make contact.

10. By a notice dated September 28, 1998 SRS Social Worker Sarah Byall advised Mr. Winston of the SRS finding that he abused D.W. On October 8, 1998, Mr. Winston called Ms. Byall and left a message stating he was going to fight her and this allegation 110% of the way, and that his attorney Tom Erker was "going to sue the pants off" Ms. Byall because he had not been interviewed concerning the abuse allegations. On October 9, 1998 Mr. Winston called Ms. Byall and left a voice mail message stating, "I demand that you call me back before 10 a.m. this morning . . . You have no idea who you are dealing with . . . You are on quicksand young lady and you better watch out because I intend to fight this every inch of the way."

11. Meanwhile in the divorce action, Mr. Winston was denied visitation. A case manager was assigned to the children in the divorce action. Mr. Winston met with the case manager in November 1998. He and the children saw therapists. After five months of not seeing his children, visitation was arranged for the evening of January 12, 1999 at the Johnson County Courthouse. These visits were to continue for about 16 weeks and to be supervised by a CASA volunteer.

12. The January 12 visitation ended up being rather short and stilted. Besides Mr. Winston and his two

children, also present were Jeff Montollio, a psychologist, Roxie O'Brien, a CASA volunteer, and Greg Rainbolt, an officer with the Johnson County Sheriff. Mr. Montollio and Mr. Rainbolt were present because D.W. was adamant that he did not want to visit his father. He was afraid his father would hit him as he'd done before. After several minutes Mr. Montollio and Mr. Rainbolt convinced D.W. he's be safe because they would be in the visitation room also.

13. When D.W. entered the visitation room he did not greet his father. D.W. sat on the opposite end of the table, diagonally, from Thomas Winston. D.W. would later tell Sarah Byall, the SRS social worker, that "the police had to be there so he would not hurt us." D.W. told Ms. Byall during a March 24, 1999 interview that he is "very afraid" of his father, who "violates our restraining order." His dad drives by the house, which makes him feel unsafe and that he "wouldn't feel safe anywhere with dad driving around . . . even with 15 policemen . . . because you never know with my dad."

14. When M.W. entered the room at the courthouse to visit her father, she was hesitant, tense and a bit apprehensive because she didn't know what to expect from the visit. Thomas Winston hugged M.W. and placed her on one leg. Her legs were dangling between his. Mr. Winston continued to hug M.W. while she was on his lap. Her thigh was right up next to Mr. Winston's crotch. While M.W. was on his lap, Mr. Winston's penis became erect. While erect, he continued to hug M.W., holding her tightly.

15. While driving home with her mom and brother after the visit with her dad, M.W. started freaking out. M.W. was frantic and crying when she told her

mom that it was hard and sticking up and that he was pushing it up against her. Upon arrival home, M.W. went to the bathroom, took off her clothes and asked her mom to wash those clothes. M.W. took a bath, and went to bed, pulling the blankets over her head. M.W. cried that night, curled up in a ball. She didn't sleep and she didn't eat for 24 hours. The next morning she refused to go to school. Finally, her mom got her to school, but she refused to go inside.

16. The school counselor, Janice Mueller, went to the car to coax M.W., who was visibly upset, inside. Once inside, M.W. drew pictures, one of which depicted M.W. sitting on her father's lap. She drew her father's erection and his weird smile. The penis was a focal point for M.W. because she kept drawing it over and over again with the marker. M.W. told Ms. Mueller that whenever she or D.W. see this particular smile on their father, they know he will hurt them in some way. M.W. told Ms. Mueller she was upset being on her dad's lap, she felt something was happening to her, she didn't like it and she wanted to get off her father's lap.

17. On January 15, 1999, M.W. was interviewed by Jorie Siegwald at Sunflower House. The interview was videotaped (Respondent's Exhibit #5). M.W. disclosed that during the visitation three days earlier while she sat on her dad's lap, "his thing a ma bobber grew," that his "wiener grew" and that she felt his wiener on her leg. She said "I just kind of noticed it when he pulled me closer and closer and he hold me a little bit tighter and I was trying to get up but I couldn't." Finally, M.W. said, Jeff Montollio asked her if she'd be more comfortable in a chair and at that point, she left her father's lap.

18. During the Sunflower House interview M.W. drew a picture of her sitting on her father's lap during the visitation. The drawing appears to depict Mr. Winston's erect penis. M.W. also reported that her father has hit her and her brother and that he'd left handprints and bruises on them. She told of one occasion where her father threw a sack of dog food at her mother and that he had hit her mother on other occasions.

19. Both D.W. and M.W. attended a weekly divorce support group in fourth grade (school year 1998-1999), facilitated by Janice Mueller the school counselor. D.W. shared with the group that his dad hit him and threatened to kill him and the rest of his family. Ms. Mueller observed that D.W. had fear in his face when he said this, like he knew not to cross his dad. D.W.'s comments just came out and did not appear coached to Ms. Mueller. Ms. Mueller has observed that since the children's father is out of the home and out of the picture, they have really come out of their shells.

20. At school, M.W. wrote about the abuse in her journal. In January 1999 she wrote: "The worst day of my life is when I have to go to court and see my child abusive dad with special people so my dad won't hurt us. I will have to do it for 16 weeks. But I'm not going in there in the small room where going into no matter what I have to do. Because I am afraid of my own dad." In another journal item she wrote, "In the middle of 3rd grade my mom filed a divorce with my abusive dad. The divorce is still going in the middle of 4th grade. But I'm glad that my mom divorced him because he would try and kill all of us which is D.W. my twin brother and my mom and me." Writing for a D.A.R.E. project, M.W. wrote: "Well I'll tell you a little about myself. I was abused since I was about two to nine years old. But

I'm still abused mentally, meaning being threatened. I was abused by my dad, which I prefer to call Tom. When I did something wrong he would solve it by choking me or throwing, and hitting me."

21. On March 29, 1999 Detective Ed McGillivray interviewed Thomas Winston regarding the incident with his daughter on January 12, 1999. Mr. Winston explained that his son has psychological problems and his wife failed to properly medicate him, so he devoted his visitation time on January 12 with his daughter. He denied getting an erection during the visit and suggested that maybe his daughter mistook his wallet and car keys, which he keeps in his front pocket, for his penis. Mr. Winston suggested that M.W. made these statements because she was being coached by his ex-wife since there is a "messy" divorce.

22. By a notice dated April 2, 1999 SRS advised Mr. Winston of its validated finding that he abused M.W.

23. The Presiding Officer concluded that:

    A. Not only did SRS substantiate the emotional, physical and sexual abuse (K.A.R. 30-46-10(e)), it also validated the abuse. Pursuant to K.A.R. 30-46-10(f)), a validated finding is one where:

    A substantiated perpetrator poses a danger to children and should not be permitted to operate, reside in, be employed by, or volunteer in a home or facility for the care of children licensed under [K.S.A. 65-516].

    B. SRS has the burden to show more likely than not the abuse occurred. This is not a heavy burden; just enough to tip the scales. In this

case, the evidence is overwhelmingly compelling that Mr. Winston physically abused D.W. and that he emotionally abused both children. Committing these acts means he cannot be entrusted to care for children, and in that context, he poses a danger to children such that he should not be allowed to work in or volunteer at a child care facility.

C. M.W.'s statement that Mr. Winston had an erection while she sat on his leg is more believable than his denial. Mr. Winston's erection suggests he was sexually stimulated. However, the evidence from the January 12 event is too thin to be called sexual abuse. The issue is not what Mr. Winston should have done when he knew of his erection, but what reasonable inferences can be drawn from what he actually did. He may have been sexually stimulated by his daughter's presence and from his hugging her tightly. Equally plausible is that he had a spontaneous erection, and having not seen his daughter in five months, he foolishly drew her closer. He forced her to have unwelcome physical contact which emotionally traumatized M.W. This might have been for his sexual stimulation, but the agency has not carried its burden on this point.

24. The Presiding Officer affirmed the agency's validated findings that Thomas Winston physically abused D.W. and that he emotionally abused both D.W. and M.W. The Presiding Officer reversed the agency's finding that he sexually abused M.W.

25. The appellant appealed to State Appeals Committee on March 13, 2000.

26. The respondent also appealed to State Appeals Committeé on March 17, 2000.

Arguments

The appellant's attorney, Frank B.W. McCollum, Kansas City, Missouri, argues that the Initial Order totally ignored all the contrary evidence which shows that it is unlikely the appellant inflicted physical and emotional abuse on D.W. The appellant argues that he was not interviewed by anyone prior to the issuance of the findings. The appellant argues that by delegating to a police officer the task of interviewing or giving the appellant the opportunity to be interviewed by a police officer is contrary to law. There is no statute or regulation anywhere which authorizes SRS to delegate the interview function to anyone else. The appellant further argues that the Presiding Officer's decision to uphold SRS's findings is unconstitutional because it violates fundamental notions of due process. The appellant also argues that the allegation he emotionally abused M.W. during the January 12, 1999 incident rests on the underlying finding he had an erection, a weird smile and he pulled M.W. closer to him has no substantial evidence in the record as a whole, and the finding of emotional abuse must be set aside.

The respondent's attorney, Paula B. Hurt, Olathe SRS Area Office, argues that it is the agency's position that the Presiding Officer made the correct determination in affirming the agency's finding that both children were emotionally abused by their father, the appellant, and that D.W. was physically abused by him. The respondent, however, disagrees with the Presiding Officer's finding that M.W. was not sexually abused

pursuant to the definitions of sexual abuse. The respondent further argues that K.A.R. 30-46-10(a) does not mandate an interview of the appellant by the agency worker. The regulation only requires that the alleged perpetrator be given the chance to tell their side of the story and that investigations of suspected child abuse and neglect may be done jointly with law enforcement. The respondent argues the appellant chose not to take advantage of the opportunity to be interviewed. The respondent further argues that when the record is taken as-a whole, it indicates M.W. was repeatedly emotionally abused by the appellant because she was a witness to the physical abuse of her mother and father. The respondent also argues that M.W. was also sexually abused by the appellant as she was sitting on his lap. The appellant was engaging in sexual stimulation when he held the child against his crotch and pulled her closer to him as he had an erection. The respondent requests that this matter be reviewed and the reversal of the agency's finding of sexual abuse of the minor child be overturned.

Conclusions of Law

The State Appeals Committee reviewed the record, the Presiding Officer's Initial Order, and the oral arguments presented. The Committee hereby adopts the Presiding Officer's Conclusions of Law and affirms the Initial Order.

STATE APPEALS COMMITTEE

/s/ George Vega by illegible
George Vega

/s/ James Wann
James Wann

/s/ Laura Howard
Laura Howard [RCS]

CERTIFICATE OF SERVICE

On September 21, 2000, I mailed a copy of this document to:

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/s/ John Mendoza
John Mendoza, Coordinator
State Appeals Committee

BEFORE THE OFFICE OF
ADMINISTRATIVE HEARINGS
STATE OF KANSAS
DEPARTMENT OF ADMINISTRATION

Thomas R. Winston, Appellant	)	
v.	)	Appeal Nos. 99Y027Q PS & 00Y0024 PS
State Department of Social and Rehabilitation Services, Respondent	)	

INITIAL ORDER

Statement of Case

Thomas R. Winston appeals from the agency's validated findings that he physically and emotionally abused his son D.W. (dob 5/19/89) – case number 00Y0024 PS – and that he sexually and emotionally abused his daughter M.W. (dob 5/19/89) – case number 99Y0270 PS.

This matter comes before the Office of Administrative Hearings for an administrative hearing pursuant to K.S.A. 75-3306, K.S.A. 75-37,121 and K.S.A. 77-501 *et.seq.* The hearing was held on February 15, 16 and 18, 2000. Testifying for the respondent was Bobbie Hohnholt, Sharon Cohen, Sarah Byall and Janice Mueller. Testifying for the appellant was Thomas Winston, Jeff Montollio, Roxie O'Brien, Greg Rainbolt, Jennifer Thomas and Sarah Byall (by deposition).

Findings of Fact

1. M.W. and D.W. are the twin children of Thomas Winston and of Julia Stearn (Winston). Mr. Winston

started being physically abusive to the children when they were in kindergarten. They are currently in fifth grade. He frequently beat up his wife Julia. In an apparent attempt to intimidate his wife and the children, Mr. Winston bought a two foot African flesh-eating fish. The fish was kept in a tank in the basement. Mr. Winston threatened to cut up his wife and their children, feed them to the fish and no one would know.

2. In September 1996 Sharon Cohen, a friend of Thomas and Julia Winston, received a frantic telephone call from Julia: Tom was choking D.W. and throwing him against the wall. Ms. Cohen spoke with Mr. Winston who complained what D.W. had done. Ms. Cohen reminded Mr. Winston that D.W. was the child and he was the adult. She told him he was out of control. She suggested he needed to leave the house and obtain counseling.

3. On or about March 4, 1998 Mr. Winston told the children that their mother would disappear one night, that they would wake up, and she'd be gone. About a week later, Mr. Winston told the children he wished their mother would drop dead. Mr. Winston has threatened, in front of the children, to kill their mother. He has said things to D.W. like "I'm going to make you disappear by cutting you up into a thousand pieces", "You're no good," "Your mom and I don't love you."

4. On March 15, 1998 Thomas Winston got so frustrated he threw D.W. across the room causing D.W. to hit his head. Ms. Stearn (Winston) took this as the last straw. She told Mr. Winston to leave or she'd call the police. She had finally had enough of his abuse. She filed for divorce on March 16, 1998. It was final in August 1999.

5. A letter written by M.W. sometime in about Spring 1998 states, "My dad said he wants my mom to go to hell. He threatens to kill my brother or my mom. He hits my brother and me very hard. It makes where he hits us very, very, very red. He throws my brother across the room very, very, very, very hard. He yells at everyone at his job and at home."

6. On August 23, 1998 while the children were visiting their father at his apartment, D.W. tried to remove a paper containing his mom's telephone number from his dad's hand. Mr. Winston picked D.W. up by his neck and pushed his face into the corner. D.W. had a hard time breathing. Mr. Winston hit D.W. several times with his hand and with a tennis shoe. M.W. observed this episode.

7. M.W. told police detective Hohnholt and social worker Byall on August 26, 1998 that her father hits them both, but that he mainly hit D.W. and hits him hard. In addition M.W. has seen her father in the past sit on D.W., strangle him and put a pillow on his face. D.W. separately reported the same thing to Detective Hohnholt and to Ms. Byall on August 26, 1998; and Julia Stearn reported the same thing to the investigators on August 27, 1998.

8. Following the incident with D.W. on August 23, 1998, Ms. Stearn obtained a restraining order against Mr. Winston. He violated this order by continuing to contact Ms. Stearn by telephone. He apparently stopped the calls after he was told by Leawood police officer Robbins that phone calls to the residence violated the order.

9. Overland Park detective Bobbie Hohnholt attempted to speak with Thomas Winston on August 27, 1998. She ended up leaving a message that it was about alleged child abuse. Mr. Winston's attorney Jim

O'Hara contacted Detective Hohnholt and they arranged an interview with Mr. Winston on September 2, 1998. On August 31, 1998 Mr. O'Hara canceled the September 2, appointment, and he told Detective Hohnholt that he (Mr. O'Hara) had referred Mr. Winston to attorney Tom Erker who handles criminal matters. When Detective Hohnholt contacted Mr. Erker, he said he was not yet representing Mr. Winston but expected to do so soon. Mr. Erker later called Detective Hohnholt and said he was representing Mr. Winston and wanted to meet regarding the allegations. Neither Mr. Erker nor Mr. Winston got back with Detective Hohnholt, even though she attempted to make contact.

10. By a notice dated September 28, 1998 SRS Social Worker Sarah Byall advised Mr. Winston of the SRS finding that he abused D.W. On October 8, 1998 Mr. Winston called Ms. Byall and left a message stating he was going to fight her and this allegation 110% of the way, and that his attorney Tom Erker was "going to sue the pants off" Ms. Byall because he had not been interviewed concerning the abuse allegations. On October 9, 1998 Mr. Winston called Ms. Byall and left a voice mail message stating, "I demand that you call me back before 10 a.m. this morning . . . You have no idea who you are dealing with . . . You are on quicksand young lady and you better watch out because I intend to fight this every inch of the way."

11. Meanwhile in the divorce action, Mr. Winston was denied visitation. A case manager was assigned to the children in the divorce action. Mr. Winston met with the case manager in November 1998. He and the children saw therapists. After five months of not seeing his children, visitation was arranged for the evening of January 12, 1999 at the Johnson County Courthouse. These visits were to continue for about 16 weeks and to be supervised by a CASA volunteer.

12. The January 12 visitation ended up being rather short and stilted. Besides Mr. Winston and his two children, also present were Jeff Montollio, a psychologist, Roxie O'Brien, a CASA volunteer, and Greg Rainbolt, an officer with the Johnson County Sheriff. Mr. Montollio and Mr. Rainbolt were present because D.W. was adamant that he did not want to visit his father. He was afraid his father would hit him as he'd done before. After several minutes Mr. Montollio and Mr. Rainbolt convinced D.W. he'd be safe because they would be in the visitation room also.

13. When D.W. entered the visitation room he did not greet his father. D.W. sat on the opposite end of the table, diagonally, from Thomas Winston. D.W. would later tell Sarah Byall, the SRS social worker, that "the police had to be there so he would not hurt us." D.W. told Ms. Byall during a March 24, 1999 interview that he is "very afraid" of his father who "violates our restraining order." His dad drives by the house, which makes him feel unsafe and that he "wouldn't feel safe anywhere with dad driving around . . . even with 15 policemen . . . because you never know with my dad."

14. When M.W. entered the room at the courthouse to visit her father, she was hesitant, tense and a bit apprehensive because she didn't know what to expect from the visit. Thomas Winston hugged M.W. and placed her on one leg. Her legs were dangling between his. Mr. Winston continued to hug M.W. while she was on his lap. Her thigh was right up next to Mr. Winston's crotch. While M.W. was on his lap, Mr. Winston's penis became erect. While erect, he continued to hug M.W., holding her tightly.

15. While driving home with her mom and brother after the visit with her dad, M.W. started freaking out. M.W. was frantic and crying when she told her mom

that it was hard and sticking up and that he was pushing it up against her. Upon arrival home, M.W. went to the bathroom, took off her clothes and asked her mom to wash those clothes. M.W. took a bath, and went to bed, pulling the blankets over her head. M.W. cried that night, curled up in a ball. She didn't sleep and she didn't eat for 24 hours. The next morning she refused to go to school. Finally, her mom got her to school, but she refused to go inside.

16. The school counsel, Janice Mueller, went to the car to coax M.W., who was visibly upset, inside. Once inside, M.W. drew pictures, one of which depicted M.W. sitting on her father's lap. She drew her father's erection and his weird smile. The penis was a focal point for M.W. because she kept drawing it over and over again with the marker. M.W. told Ms. Mueller that when ever she or D.W. see this particular smile on their father, they know he will hurt them in some way. M.W. told Ms. Mueller she was upset being on her dad's lap, she felt something was happening to her, she didn't like it and she wanted to get off her father's lap.

17. On January 15, 1999 M.W. was interviewed by Jorie Siegwald at Sunflower House. The interview was videotaped (Respondent's Exhibit #5). M.W. disclosed that during the visitation three days earlier while she sat on her dad's lap, "his thing a ma bobber grew," that his "wiener grew" and that she felt his wiener on her leg. She said "I just kind of noticed it when he pulled me closer and closer and he hold me a little bit tighter and I was trying to get up but I couldn't." Finally, M.W. said, Jeff Montollio asked her if she'd be more comfortable in a chair and at that point, she left her father's lap.

18. During the Sunflower House interview M.W. drew a picture of her sitting on her father's lap during the

visitation. The drawing appears to depict Mr. Winston's erect penis. M.W. also reported that her father has hit her and her brother and that he'd left handprints and bruises on them. She told of one occasion where her father threw a sack of dog food at her mother and that he had hit her mother on other occasions.

19. Both D.W. and M.W. attended a weekly divorce support group in fourth grade (school year 1998-1999), facilitated by Janice Mueller the school counselor. D.W. shared with the group that his dad hit him and threatened to kill him and the rest of his family. Ms. Mueller observed that D.W. had fear in his face when he said this, like he knew not to cross his dad. D.W.'s comments just came out and did not appear coached to Ms. Mueller. Ms. Mueller has observed that since the children's father is out of the home and out of the picture, they have really come out of their shells.

20. At school, M.W. wrote about the abuse in her journal. In January 1999 she wrote: "The worst day of my life is when I have to go to court and see my child abusive dad with special people so my dad won't hurt us. I will have to do it for 16 weeks. But I'm not going in there in the small room where going into no matter what I have to do. Because I am afraid of my own dad." In another journal item she wrote, "In the middle of 3rd grade my mom filed a divorce with my abusive dad. The divorce is still going in the middle of 4th grade. But I'm glad that my mom divorced him because he would try and kill all of us which is D.W. my twin brother and my mom and me." Writing for a D.A.R.E. project, M.W. wrote: "Well I'll tell you a little about myself. I was abused since I was about two to nine years old. But I'm still abused mentally, meaning being threatened. I was abused by my dad which I prefer to call Tom. When I did something

wrong he would solve it by choking me or throwing, and hitting me."

21. On March 29, 1999 Detective Ed McGillivray interviewed Thomas Winston regarding the incident with his daughter on January 12, 1999. Mr. Winston explained that his son has psychological problems and his wife failed to properly medicate him, so he devoted his visitation time on January 12 with his daughter. He denied getting an erection during the visit and suggested that maybe his daughter mistook his wallet and car keys, which he keeps in his front pocket, for his penis. Mr. Winston suggested that M.W. made these statements because she was being coached by his ex-wife since there is a "messy" divorce.

22. By a notice dated April 2, 1999 SRS advised Mr. Winston of its validated finding that he abused M.W.

Conclusions of Law

1. Emotional, physical and sexual abuse are defined in K.A.R. 30-46-10 as follows:

> (g) "Mental or emotional abuse" means acts or omissions that impair a child's social, emotional, or intellectual functioning or present a likelihood of such impairment. Emotional abuse shall include the following:
>
> (1) Terrorizing a child, by creating a climate of fear or engaging in violent or threatening behavior toward the child or toward others in the child's presence that demonstrates a flagrant disregard for the child;

. . .

(j) "Physical abuse" means non-accidental or intentional action or inaction that results in bodily injury or that presents a likelihood of death or of bodily injury.

(k) "Sexual abuse" means any contact or interaction with a child in which the child is being used for the sexual stimulation of the perpetrator, the child, or another person.

2. Not only did SRS substantiate the emotional, physical and sexual abuse (K.A.R. 30-46-10(e)), it also validated the abuse. Pursuant to K.A.R. 30-46-10(f), a validated finding is one where:

> A substantiated perpetrator poses a danger to children and should not be permitted to operate, reside in, be employed by, or volunteer in a home or facility for the care of children licensed under [K.S.A. 65-516].

3. SRS has the burden to show more likely than not the abuse occurred. This is not a heavy burden; just enough to tip the scales. In this case, the evidence is overwhelmingly compelling that Mr. Winston physically abused D.W. and that he emotionally abused both children. Committing these acts means he cannot be entrusted to care for children, and in that context, he poses a danger to children such that he should not be allowed to work in or volunteer at a child care facility.

4. The appellant desires that the two findings regarding D.W. be summarily dismissed because he was not interviewed. K.A.R. 30-46-13 provides:

> Each alleged perpetrator shall have an opportunity to be interviewed before a finding is issued validating a perpetrator under K.A.R. 30-46-15.

5. The operative word is "opportunity". No actual interview need occur. Neither Mr. Winston nor Tom Erker, his attorney, followed through with Detective Hohnholt. Detective Hohnholt testified "Tom Wilson [sic] had plenty of opportunity to come in for an interview." The evidence supports this conclusion. Mr. Winston argues that he didn't know that any interview he may have had with Detective Hohnholt would be shared with SRS. The regulation doesn't require that the opportunity to be interviewed must be offered by an SRS employee. Mr. Winston argues that according to the internal SRS policy manual it is the SRS social worker who must conduct the interview. However, the more specific policy manual section (2323), provides that law enforcement can provide an opportunity to be interviewed. In any event, the regulation supercedes the policy manual and it requires only an opportunity to be interviewed. That opportunity was offered.

6. Mr. Winston repeatedly pointed out that D.W. is "difficult" when he's not on his medicine which he takes for attention deficit hyperactivity disorder and for oppositional defiant disorder. Although D.W.'s behaviors frustrated Mr. Winston, there is no evidence that D.W.'s condition and medication caused him to perceive and remember events in a distorted fashion. Further, because a child acts out for whatever set of reasons, is not an excuse for throwing him across the room, shoving his face into the corner and threatening to kill his mother.

7. Mr. Winston does remember the evening of March 15, 1998, but he remembers it somewhat differently from his children and his ex-wife. Mr. Winston

remembers that his then eight year old son blocked the door to the house with his body for about 20 minutes, not letting Mr. Winston in. Eventually he stepped over D.W. to enter. Mr. Winston claims D.W. pushed him while he was on the phone. At some point, D.W. "hit the deck", according to Mr. Winston. After he got off the phone his wife accused him of throwing D.W. against the wall. "A heated discussion" ensured. It was "disconcerting" to Mr. Winston that his wife would not give D.W. his medicines.

8. Mr. Winston also remembers the evening of August 23, 1998, but not exactly the way the children remember it. He agrees D.W. tried to remove the paper with Julia's telephone number from his hand. Mr. Winston asserts D.W. successfully obtained the paper and then played keep away with Mr. Winston for 10-15 minutes. Eventually, Mr. Winston managed to "slide" the paper from D.W.'s hands. Instead of Mr. Winston pulling D.W. up by the neck and forcing his face into a corner, Mr. Winston remembers that D.W. made a running leap at him, attacked him, but slid off and ended up on the floor.

9. Mr. Winston remembers speaking by telephone with Sharon Cohen in September 1996, but he doesn't remember it quite the way she does. Mr. Winston says he and D.W. were wrestling, and that D.W. rolled over and hit his head on a table. Julia then called Sharon and told her that Mr. Winston was abusing D.W. Mr. Winston then spoke with Ms. Cohen who asked him if he was hitting D.W. He told her he wasn't. "Sharon Cohen is a liar", Mr. Winston testified. According to Mr. Winston, Ms. Cohen is lying because he bought a life insurance policy when he was 43 (he is now 50) from Ms. Cohen's husband, but he canceled it shortly after the separation. Ms. Cohen is also lying because she is a friend of Julia

and she's a friend of Julia's lawyer, according to Mr. Winston.

10. D.W. and M.W. have consistently told the police, SRS, their school counselor, Jeff Montollio and M.W.'s journal that their dad hits the, he threatens to hurt their mother and that they are afraid of him. Mr. Winston says the children are saying these things because Julia has coached them, that she hates him so much she's turned the children against him. However, little to no evidence exists to support this theory.

11. Mr. Winston testified that between March and August 1998 one of Julia's friends told him that she said she would charge him with abuse of the kids. This unidentified friend never testified. This self-serving testimony does not constitute corroborating evidence of coaching.

12. Mr. Winston argues that M.W.'s use of the expression "child abusive dad" shows Julia coached M.W. This is simply another theory, but it is not evidence. There are plenty of different ways M.W. may have picked up this language and one may be from her mother. It's unsupported speculation however, to say it came from Julia Stearn in a coached fashion.

13. The most reasonable and rational explanation for why the children have said these things against their father is that the allegations are true. D.W. did not want to visit his father even with a police officer in the room. The children had no reason to lie to their small divorce support group. Ms. Mueller saw no evidence of coaching. Although child abuse allegations made in a divorce context raise red flags, the mere raising of these flags is not *ipso facto* proof of coaching. One viewing of the videotaped interview with M.W. demonstrates she was not coached. No motive

for why the children might be lying (other than coaching) was even advanced by the appellant. Mr. Winston, however, has lots of motive to lie.

14. M.W.'s statement that Mr. Winston had an erection while she sat on his leg is more believable than his denial. M.W.'s behaviors when she got home – taking a bath, curling up in a ball, not eating, refusing to go to school – could not be coached. This girl knew that her father's wiener grew. Wallets and car keys don't grow. He hugged her tightly and it profoundly upset her. She remembered that weird, abusive smile and she recognized it to mean that he would hurt her in some way. This event traumatized M.W. As of January 29, 1999 M.W. was waking up with nightmares and as of February 5, 1999 she was destroying things her father gave her. This incident provides additional evidence that Mr. Winston emotionally abused M.W.

15. Mr. Winston's erection suggests he was sexually stimulated. However, as SRS pointed out, it's possible the erection was spontaneous, i.e., non-sexual. And yet, Mr. Winston knew he had an erection and he drew M.W. closer. The appropriate response would have been for Mr. Winston to move M.W. off his lap; not to pull her closer. Certainly M.W. perceived this as inappropriate. However, the evidence from the January 12 event is too thin to be called sexual abuse.

16. The issue is not what Mr. Winston should have done when he knew of his erection, but what reasonable inferences can be drawn from what he actually did. He may have been sexually stimulated by his daughter's presence and from his hugging her tightly. Equally plausible is that he had a spontaneous erection, and having not seen his daughter in five months, he foolishly drew her closer. He forced her to have unwelcome physical contact which emotionally

traumatized M.W. This might have been for his sexual stimulation, but the agency has not carried its burden on this point.

Conclusion

The agency's validated findings that Thomas Winston physically abused D.W. and that he emotionally abused both D.W. and M.W. are affirmed. The agency's finding that he sexually abused M.W. is reversed.

OFFICE OF ADMINISTRATIVE HEARINGS

/s/ Stephen E. Good
Stephen E. Good
Presiding Officer
Office of Administrative Hearings

CERTIFICATE OF SERVICE

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